Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K MEHL, SGT STEVEN FOCHT, SGT DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD, *PETITIONERS,*

-versus-

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California, *RESPONDENTS.*

On Writ of Certiorari to the US Court of Appeals for the Ninth Circuit, Stephen Reinhardt, Raymond C. Fisher, Circuit Judges, & Frank J. Magill, Senior Circuit Judge, Eighth Circuit, by designation.

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in denying *standing* for Petitioner firearms owners and collectors to challenge under the Second & Fourteenth Amendments State statutes restricting such ownership, where Petitioners are: (**A**) seriously affected by the statutes, (**B**) in the zone of interests impacted, and (**C**) would risk prosecution and confiscation by further purchase, sale, transfer, or other noncompliance?

II. Whether the Second and Fourteenth Amendments protect the rights of *individual* persons to keep and bear arms for family, home, business and community defense, without the threat of forcible state confiscation, compulsory registration, or state-decreed monopolization?

A. Whether the right to keep and bear arms should be substantially *incorporated* into the Fourteenth, applied to the States, and *Presser v. Illinois* (US 1886) [1] limited or overruled?

B. Whether the Second Amendment should be held to be part of the Fourteenth Amendment protected *privileges and immunities* of citizens, as the documentary history suggests, and *Saenz v. Roe* (US 1999)[2], applied. Then, whether *United States v. Cruikshank* (US 1876)[3], and the *Slaughterhouse Cases* (US 1873)[4], should be limited or overruled?

III. Whether the heavily criticized and ambiguous decision of Justice McReynolds in *United States v. Miller* (US 1939)[5], decided without argument or counsel for Miller, should be limited or overruled after these 64 years, in favor of a comprehensive opinion from this Court recognizing as fundamental the individual right of

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1 116 U.S. 252 (1886).
2 526 U.S. 489, 503-04 (1999).
3 92 U.S. 542 (1876).
4 83 U.S. (16 Wall.) 36 (1873).
5 307 U.S. 174 (1939).

family, home, business, and community defense under the Second and Fourteenth Amendment right to keep and bear arms?

IV. Whether a *heightened standard of review* should be applied to a State statute that specifically impacts fundamental rights expressly protected by the Second Amendment and incorporated into the Fourteenth for additional reasons of family, home, business, and community defense that further emerged after the Civil War with the forced disarming of the freedmen and oppression of their families and entire communities based upon race, as in the Colfax and New Orleans massacres?

V. Whether the judgment of the Court of Appeals should be reversed and the case remanded for trial on the merits, and a record of expert and factual testimony developed concerning the Second Amendment and the specific firearms and factual issues involved in this case?

VI. Whether for remand this Court should order assessment of §1988 interim litigation expenses and counsel fees for Petitioners prior to trial on the merits of the remaining factual and legal questions?

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OPINIONS BELOW

The opinion of the US Court of Appeals for the Ninth Circuit under review is *Silveira* v. *Lockyer,* 312 F.3d 1052 (9th Cir.)(Reinhardt, J), *rehearing en banc denied,* 328 F.3d 567 (9th Cir. 2003)(six dissents)(**APPENDIX** at 1A-121A).

JURISDICTION OF THIS COURT

US Code title 28, §1254(1), confers jurisdiction upon the Court to decide this appeal on certiorari. Analogous cases granted, with comparable grounds for review include: *Lawrence* v. Texas, 539 U.S. ___ (2003), *Virginia* v. *Black,* 123 S Ct ___ (2003), *Wilson* v. *Layne,* 526 U.S. 603 (1999)(family home as fortress), *Saenz* v. *Roe,* 526 U.S. 489 (1999)(privileges and immunities), *Troxel* v. *Granville,* 530 U.S. 57 (2000)(fundamental family protection rights), *Truax* v. *Raich,* 239 U.S. 33, 38 (1915)(standing and ripeness).

(i) The panel judgment of the US Court of Appeals under review was filed initially December 05, 2002, and amended January 27, 2003. 312 F.3d 1052.

(ii) The Court of Appeals denied a petition for rehearing en banc on May 6, 2003. 328 F.3d 567. Six Circuit Judges dissented, four with opinions: Judges Kozinski, Kleinfeld, Gould, and Pregerson.)(**APP.** at 1A-40A).

STATEMENT OF THE CASE

Petitioners are a group of California gentlemen, good citizens, placed at great risk and disadvantage by California legislation[1] restricting the ownership, possession, and transfer of certain firearms useful for home, family, and community defense in cases of civil disturbance and terrorist disruption. Paragraphs 31 & 32 of the First Amended Complaint gave general notice

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1 The California statutes are referenced in the opinion of the US Court of Appeals below, set out in the APPENDIX, *infra.*

of their vital interests at stake and the concrete impact of the laws upon them:[2]

"31. Plaintiffs own, or would like to own, semi-automatic rifles and/or pistols subject to the terms of the statute which prohibits and/or restricts possession, use, transfer and/or sale of semi-automatic rifles and/or pistols.

"32. Plaintiffs would like to exercise their right to possess, carry and conceal firearms ..."[3] in much the

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2 Under *Conley* v. Gibson, 355 U.S. 41, 45 (1957), matters alleged are presumed to be established and provable in an appeal following dismissal on the pleadings.

3 The nature, extent, and constitutional deficiencies of any *specific* restrictions on the right to keep and bear arms in this case should first be argued in depth and determined at trial on remand after guidance from this Court, and full expert and lay testimony. This petition does not present specific questions on the details of those complex Second Amendment issues. It squarely raises only the core Second/Fourteenth Amendment right to keep and bear arms issues, as well as the important need for a heightened standard of review of any infringements of this express fundamental right.

The Court should be aware that the pejorative expression "assault weapon" is used by anti-firearm activists to frighten and mislead, not to inform. The firearms in question are well-engineered and functionally ordinary rifles useful for home and personal defense, sport, hunting, and protection against terrorists and looters in times of civil disturbance. "Assault weapon" belongs in the Political "Buzzword Hall of Fame." It obstructs rather than aids the constitutional inquiry. The same is true of the other "buzzword," "sawed-off shotgun." Our Revolutionary defenders used the analogous short-barreled shot-shooting "blunderbuss" defensively against the British, especially in close naval combat. Later, explorers such as Lewis & Clark, and stage coach guards, used short guns against highway robbers and grizzly bears. The British in 1775 forcibly disarmed Bostonians of some 38 blunderbusses because such short-barreled shotguns were useful and effective defensive weapons, and still are. *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.).

An excellent detailed and illustrated history of versatile short-barreled firearms as military and defensive weapons is IV SWEARENGEN, THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978). Author-scholar Swearengen deflates much of the uninformed bias toward shotguns. He notes that while John

same manner as did the Founders of the Constitution and authors of the Bill of Rights. The First Amended Complaint states:

Para 35: "Plaintiff PATRICK OVERSTREET is a resident of Marin County .... He is employed by the San Francisco Police Department as a S.W.A.T. officer, and [is] a graduate of California State University...."

Para 37: "Plaintiff SGT. STEVEN FOCHT ... performed military functions in Desert Storm .... He was honorably discharged, and currently [is] a Sergeant in the California Army National Guard."

Para 38: "Plaintiff SGT. DAVID BLALOCK is a resident of Sacramento County .... He was assigned to the 82nd Airborne Division [and] is a Purple Heart recipient from combat injuries .... [He is] currently a Sergeant in the California Army National Guard."[4]

ARGUMENTS FOR GRANT OF CERTIORARI

I. THE COURTS OF APPEAL ARE IN SERIOUS CONFLICT OVER THE REQUIREMENTS FOR *STANDING* OF LITIGANTS TO CHALLENGE RESTRICTIONS ON THE SECOND AND FOURTEENTH AMENDMENT RIGHT TO KEEP AND BEAR ARMS. THE OPINION BELOW ON STANDING CONFLICTS WITH: (A) THE CONTRARY RESULT IN *US V. MILLER*, 307 U.S. 174 (1939), (B) NUMEROUS HOLDINGS FROM THIS COURT, (C) THE PERSUASIVE IN-DEPTH ANALYSIS OF OTHER CIRCUITS & JUDGES, (D) THE ANALYSIS OF *US V. EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE CONSIDERED

Dillinger used short shotguns, so too did the US Military in World War I, and often the police in modern times. Id. at 278-288. The 18 or 20 inch barrel length was an arbitrary line, with no basis in Second Amendment language or history. A short shotgun is simply more maneuverable for close range defense.

[4] The notice allegations in this case generally aver that plaintiffs have direct and immediate interests in contesting the restrictions of the law that affect them directly, sufficient to meet basic requirements of standing and ripeness. Petitioner-plaintiffs assert federal question and civil rights jurisdiction under 28 U.S.C. §§1331, 1343, and raise meritorious federal constitutional claims.

VIEWS OF JUDGES KOZINSKI, KLEINFELD, O'SCANNLAIN, NELSON & GOULD DISSENTING FROM DENIAL OF REHEARING EN BANC.

Individual **standing** was not a difficult question in the 1939 Second Amendment case here, *US* v. *Miller*.[5] The government did not contest the standing of affected *individuals* to challenge firearms restrictions, when faced with possible enforcement, fines, and other criminal penalties.[6] Standing was evident in *Miller*, whether Jack Miller had sued before being prosecuted, or defended afterwards. Judge Kozinski in dissent points out that *Miller* upheld the standing of the individual defendants, and then moved on to the merits.[7] See also *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-46 (1972)(leading standing case).

The *Silveira* decision below, however, approaches standing in an atypical awkward way. Judge Reinhardt relates standing to the merits, which he also decided incorrectly. The complaint is more than adequate for standing under decisions of this Court.

The present Court and others have noted the American "background of widespread lawful gun ownership ...." *United States* v. *Harris*, 959 F.2d 246 (DC Cir. 1992)(per curiam)(Ruth Bader Ginsburg, Clarence Thomas, & Silberman, JJ).[8] The Court has

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[5] 307 U.S. 174 (1939). Similarly, Lawrence had standing to challenge the Texas law at issue in *Lawrence* v. *Texas*, 539 U.S. ___ (2002), although *Bowers* seemingly foreclosed his claim, until this Court overruled *Bowers*. *Miller* is at least as weak a precedent and ripe for overruling as *Bowers*. Here we have a fundamental enumerated right and a more extensive documentary history.

[6] It is undisputed that California enforces the statutes.

[7] *Silveira* v. *Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003)(Kozinski, *J*, dissenting from denial of rehearing en banc).

[8] One Colonial history after the other portrays the early American families as armed for protection. Benjamin Franklin organized one of the first private defensive militia when the Quaker government declined to do so. *See* AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 182-183 (Yale 2d ed. 2003). Males from 17 upward, and many females, used their privately held arms in joining with the informal and formal community militia in the revolution against British

repeatedly decided important standing cases where the existence of a new statute, and the reasonable possibility of prosecution, allows a pre-enforcement decision on the merits for persons adversely affected. *Gratz* v. *Bollinger*, 539 U.S. ___ (2003)(slip opinion pp. 11-14), *Thompson* v. *Western States Medical Center*, 534 U.S. ___ (2002)(pre-enforcement standing found), *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)(ripeness without enforcement). See also *Ashcroft* v. *Free Speech Coalition*, 534 U.S. ___ (2002), on the Amendment adjacent to the Second. *See* Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967), is a leading standing case that conflicts with the court below. Justice Harlan noted there:

"the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." Id. at 152.

The *Silveira* statement[9] on standing is this:

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oppression. The British always had the disarming of American patriots high on their agenda. See RAPHAEL, A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION 49, 55 (N.Y. New Press 2001). The "shot heard round the world" was fired by British intent upon disarming Americans. That is part of the solid backdrop of the Second Amendment rationale for protecting the rights of citizens to be armed for defense against redcoats, burglars, looters, or terrorists.

[9] The *Silveira* opinion initially cited Michael A. Bellesiles, *Gun Control: A Historical Overview*, 28 CRIME & JUST. 137, 174-76 (2001)...." 312 F.3d at 1052, 1057 n.1.

Michael Bellesiles is the historian who in 2002 resigned under pressure from Emory University, and was also stripped of his Bancroft Prize by Columbia University for faulty historical research on this issue, which the Court below embraced. On January 27, 2003, Judge Reinhardt deleted the Bellesiles cite and substituted another in its place: *See* EARL R. KRUSCHKE, GUN CONTROL 84, 170 (1995). The KRUSCHKE book, however, supports these petitioners.

Another Ninth Circuit panel promptly critiqued Judge Reinhardt for his advisory opinion in *Silveira*. *Nordyke* v. *King*, 319 F.3d 1185 (9th Cir. 2003), as did the six circuit judges dissenting from denial of rehearing en banc here. 327 F.3d at 567-592.

"The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position. [P]laintiffs lack standing ...." 312 F.3d at 1056.

That quote from Judge Reinhardt is a *non sequitur,* with *multiple* errors. *Miller* did *not* reject an individual rights position at all. *Miller* accorded standing to Jack Miller, allowing him to challenge the statute on its merits, even though he was dead, and had no counsel or argument in the Supreme Court.[10] The *Miller* litigation never was resolved because Jack Miller was gone. He could not therefore press to put on further evidence and argument at trial post-remand.

Silveira recognized the divisive conflict of Circuits:

"Other courts have addressed Second Amendment claims on the merits, rather than under the rubric of standing doctrine. *See, e.g., Gillespie*, 185 F.3d at 710. ***" 312 F.3d at 1067 n.17.

II. THE COURTS OF APPEAL ARE IN FURTHER CONFLICT ON WHETHER THE SECOND AMENDMENT PROTECTS THE RIGHTS OF *INDIVIDUAL* PERSONS TO KEEP AND BEAR ARMS FOR FAMILY, HOME, BUSINESS, AND COMMUNITY DEFENSE. THE OPINION BELOW BY JUDGE REINHARDT DISREGARDS:

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10 As historical fact, Jack Miller was denied appellate counsel and argument. He was given only two weeks to obtain counsel and file a brief. *See* NATIONAL ARCHIVES, Supreme Court Case Records, *United States* v. *Miller,* October Term 1938, No. 696. The Justices noted probable jurisdiction in *Miller* on March 13, 1939. Under current practice, Rule 25[1], the government would have 45 days from March 13 to file the appellant's brief on the merits, to April 27, 1939. Counsel for Miller would then have 30 more days to file a brief for appellee, until May 27. However, in 1939, the Clerk gave Miller only until March **31** to file a brief and appear for argument. In fact argument was held one day before, with Miller not represented at all. 307 U.S. 174. This material was uncovered in 2003, and is the subject of a pending article: Lucas, *Miller* Revisited (2003). It is also included in a chapter of the forthcoming book analyzing the Second and Fourteenth Amendment right to arms issues: LUCAS, TO KEEP AND BEAR ARMS (2003-04).

(A) CONTRARY STATEMENTS IN *US v. MILLER*, 307 U.S. 174 (1939), (B) OTHER BILL OF RIGHTS AMENDMENTS, (C) FREQUENT LANGUAGE FROM THIS COURT, (D) THE PERSUASIVE IN-DEPTH ANALYSIS OF *US* v. *EMERSON*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 534 U.S. ___ (2002), & (E) THE STRONG ARGUMENTS PUT FORTH BY THE SIX CIRCUIT JUDGES BELOW DISSENTING FROM DENIAL OF REHEARING EN BANC.

" ... John Adams quoted Serjeant-at-Law William Hawkin's Pleas of the Crown ... regarding the right: 'Here every private person is authorized to arm himself' for his own defense. Similarly, Samuel Adams quoted Blackstone on the personal right to bear arms."

LEONARD LEVY, ORIGINS OF THE BILL OF RIGHTS 141 (Yale 1999)

The First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments all protect *individual* rights, *not* rights of the State. The Fourteenth Amendment also concerns *individual* rights, not rights of the former Confederate states. When James Madison in 1789 introduced the Bill of Rights he wrote that they "relate first to private rights." 12 PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 193 (Univ. Press of Virginia 1979). He was not introducing rights of States but of individuals.

The Second Amendment also pointedly assures that "*the right of the people to keep and bear arms shall not be infringed.*" The *Silveira* Reinhardt opinion is at odds with the language and purposes of the Second, even moreso after ratification of the Fourteenth.[11] As Judge Kozinski noted in dissent below (**APP.** at 4A),[12] the Fourteenth was preceded by frequent explicit discussion of the need for freedmen (and white supporters) to be protected in their rights

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[11] *Silveira* acknowledges that *Miller* is "a somewhat cryptic discussion" and "offers little guidance as to what rights the Second Amendment does protect," 312 F.3d at 1061.

[12] *Silveira* v. *Lockyer*, 327 F.3d 567, 568-69 (9th Cir. 2003)(Kozinski, *J*, dissenting from denial of rehearing en banc).

to bear arms, and to defend themselves from attacks, lynching, and outright massacre by the Klan.[13]

A. CONFLICT AMONG THE CIRCUITS

Silveira, and *Emerson* from the Fifth Circuit, are verbally at war on this point. Six dissenters from the Ninth are on the side of the Fifth, including Judges Kozinski, Kleinfeld, O'Scannlain, Nelson, and Gould (**APP**. at 1A-40A), aligned against Reinhardt. *Silveira* describes the broader disarray across all of the Circuits: "[T]he majority of circuit courts have, with comparatively little analysis, adopted the collective rights view[;] the Third and Tenth Circuits appear to have suggested the possible use of some form of intermediate model." 312 F.3d at 1064 n.11. 270 F.3d at 218-20. The Court in *Emerson* concluded in the words of Judge Garwood (who studied History at Princeton):

"We have found no historical evidence that the Second Amendment was intended to convey militia power to the states, ... or applies only to members of a select militia while on active duty. All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans.

"We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select

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[13] This material can be thoroughly developed in briefing. See generally FREEDMENS BUREAU ACT, 14 STAT. 173, 176 (JULY 16, 1866) (specifically "including the constitutional right to bear arms"), AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 257-68 (1998), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison books 2000), Cottrol & Diamond, *The Second Amendment: Toward an Afro-American Reconsideration,* 80 GEO. L.J. 309 (1991), Levinson, *The Embarrassing Second Amendment,* 99 YALE L.J. 637 (1989)(article on errors of *Miller* and individual rights protected by Second Amendment), Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 MICH. L. REV. 204 (1983), Halbrook, *The Freedmen's Bureau Act ...,* 29 NO. KY. L. REV. 683 (2002).

militia or performing active military service or training." Id. at 260.

Silveira makes this forlorn observation:

"We agree that our determination in *Hickman* that *Miller* endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it." 312 F.3d at 1064.

Petitioners will also respectfully urge former members of the First Circuit to exercise independent reconsideration of previous per curiams from their Circuit.[14] Those trace back to very early cases of the 1940s. The Court today can do far better than *US* v. *Miller* and *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), an early, unusual, and arguably erroneous application of *Miller*.

Within the Ninth Circuit there is also stark and repeated internal disagreement. Less than a month after *Silveira*, another Ninth Circuit panel disagreed on the merits, but also held itself bound by *Hickman*. *Nordyke* v. *King*, 319 F.3d 1185 (9th Cir. 2003), said this: "the *Silveira* panel's exposition of the conflicting interpretations of the Second Amendment was both unpersuasive and ... unnecessary." A member of the *Nordyke* panel wrote an extensive rebuttal to *Silveira*. *Nordyke* v. *King*, *supra* (Gould, *J*, concurring). Judge Gould concluded:

"*Hickman* v. *Block*, 81 F.3d 98 (9th Cir. 1996), was wrongly decided, that the remarks in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2002), about the 'collective rights' theory of the Second Amendment are not persuasive, and that we would be better advised to embrace an 'individual rights' view of the Second Amendment, as was adopted by the Fifth

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14 *See, e. g., United States* v. *Friel*, 1 F.3d 1231 (1st Cir. 1993)(per curiam)(federal conviction for possessing a firearm after a felony conviction upheld – Second Amendment argument rejected.). *Friel* is distinguishable as a felon in possession case. This petition does not present any such issues.

Circuit in *US* v. *Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), consistent with *US* v. *Miller*, 307 U.S. 174 (1939)." 319 F.3d at 1192. (*See also* **App.** at 39A).

The repeated conflicts in and among *Emerson*, *Nordyke*, *Silveira*, and other cases, are compelling reasons for the Court to take up this important case.

B. Dictum References to Individual Right

This Court lastly appears, in repeated dicta, to regard the Second Amendment as an *individual* right. Surely the first relevant reference to the Second Amendment in the US Reports appears in the denial of *all* rights to Dred Scott in *Scott* v. *Sandford*, 60 U.S. (19 Howard) 393, 416-17 (1856)(Taney, *CJ*). Taney attempts to justify his denial of rights to slaves:

> "For if they were so received, and entitled to the privileges and immunities of citizens ... . It would give to persons of the negro race ... the full liberty of speech ... ; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."

Taney equates the First and Second amendments as fundamental core rights. He makes no mention of the grammatically prefatory militia clause in the Second Amendment. As these Petitioners and six dissenting Ninth Circuit judges suggest, that clause was a reminder of only one purpose of the Amendment, among several others. It is not worded as a limitation on the express right, and certainly does not restrict the Fourteenth Amendment. It does not say that the right belongs to the States. (States have *powers* more than rights.) Its negative usage is an example of historical revisionism.

The recent Copyright extension case, *Eldred* v. *Ashcroft*[15] is instructive by analogy. Eldred argued that the preambular language identified the sole purpose for which Congress may legislate, that the meaning of "limited Times" must be 'determined in

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[15] 123 S Ct 769 (2003).

light of that end. The preamble of Article I, §8, cl. 8 states a purpose "to Promote the Progress of science and useful arts ...." This Court refused to accept a reading of the Copyright Clause tied to its Preamble: "by securing for limited times to authors." The Court declined to use the vague term "limited times" as a limitation on the term of a copyright. The militia clause in the Second Amendment is just as vague and not intended or written as a limitation on the right of the people to keep and bear arms. Significantly, Justice Ginsburg stated in *Eldred*: "It is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[16]

The Court could clarify as it did in *Eldred* that the preamble is not a narrow limitation. The militia interest is, under the *Eldred* approach, but one of several historical purposes, applicable today to home and business defense.[17] *Eldred* comes as a timely analogy. Congress has spoken for the right to keep and bear arms on many occasions, as when the Freedmen's Bureau Act was enacted in part to protect "the right of the people to keep and bear arms ...."[18]

The *Silveira* court disregards further significant dicta from this Court. Chief Justice Rehnquist, in a well-considered reference in *US* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), stated:

"The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.' ..."

Similarly, the plurality opinion in *Planned Parenthood* v. *Casey* in considered dictum treats the

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16 Id. at 785.

17 A local reminder would be the recent tale of DC Mayor William's barber chasing a robber away with a defensive firearm. See Washington Post, B5, May 17, 2003.

18 14 STAT. 173, 176. *See generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 (Praeger 1998).

Second Amendment as an individual right.[19] This reflects a widespread understanding that the Second Amendment protects a fundamental individual right to keep and bear arms. This right is all the more important because this Court has recognized no liberty right to protection by the police when being threatened or attacked.[20] Citizens *need* the Second Amendment for protection of their families, homes, and businesses.

A great many more jurists, scholars, and courts have found the Second Amendment right to be individual, as well as community oriented. These include Pulitzer Prize winning Bill of Rights scholar Leonard Levy.[21] Justice Joseph Story, certainly a

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19 The plurality opinion by Justices Souter, O'Connor, and Kennedy in *Casey* states:
"Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Constitution, Amendment IX. As the second Justice Harlan recognized:
'... This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; ... and so on. ... [C]ertain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' " *Casey*, 505 U.S. 833, 849 (1992). See also Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 866 (1960)(incorporation of Bill of Rights into Fourteenth).

20 Cases such as *Hernandez* v. *City of Goshen*, 324 F.3d 535 (7th Cir. 2003), uniformly find no police department liability under §1983 for reckless indifference in responding to imminent threats that turn fatal. This leaves the first line of self defense against home burglars, looters, and terrorists in the citizens' own hands.

21 See, e. g., AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), LEVY, LEONARD W., ORIGINS OF THE BILL OF RIGHTS 133-149 (Yale 1999 ed.), COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), V RAWLE, WILLIAM, A VIEW OF THE CONSTITUTION OF THE UNITED STATES doc. 9 (Phila. 2d ed., 1829)(NY: DaCapo Press 1970), Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992), Barnett & Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1141 (1996), Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J. LAW. & POL. 1 (1987), Van

credible authority on matters from the founding era, would agree with petitioners. He stated, long ago, and in context: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic ...." III STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION at 746, §1890 (Rothman 1st ed 1991). This Court should resolve these conflicts in the lower courts over "individual rights."

III. THE DECISION OF THE COURT OF APPEALS IS ALSO IN CONFLICT WITH PERSUASIVE EARLY DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES INTERPRETING THE FEDERAL SECOND AMENDMENT AS PROTECTING AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

One important conflicting historical State case is *Nunn* v. *Georgia*, 1 GA. 243, 250 (1846), decided by the highest court of one of the original thirteen States. *Nunn* stated:

"The language of the second amendment is broad enough to embrace both Federal and State governments ...."

That Georgia Supreme Court held specifically:

"The right of the whole people, old and young, men and women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed ... in the smallest degree ...."[22]

The holding of *Nunn* reflects the venerable view of RAWLE, cited above. It also finds support in the dissenting opinion below of Judge Kleinfeld. (**APP.** at 16A). *Nunn* is much closer to the history and heart of the Founders' Second Amendment.[23] The *Silveira*-

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Alstyne, *The Second Amendment and the Personal Right to Arms*, 93 DUKE L.J. 1236 (1994).

[22] *Nunn* v. *Georgia*, 1 GA. 243, 251 (1846)(Lumpkin, *J*).

[23] A second historic and conflicting State Second Amendment decision, contrary to the Ninth Circuit, is *In re Brickey*, 70 Pac. 609, 101 Am. St Rep 215 (Idaho 1902)(Quarles, *CJ*). *Brickey* squarely held that a state law prohibiting private persons from

Reinhardt opinion snubs the rich State court jurisprudence in this field. *Miller* also missed many thoughtful and relevant state constitutional provisions and cases.[24] Justice McReynolds relied on *Aymette* v. *State,* 21 Tenn. (2 Humphr) 154 (1840), which involved a ruffian aggressively brandishing a bowie knife after a quarrel. It would be a daunting task to find a case more inapposite for analyzing the Second Amendment rights of peaceable citizens.

This Court should grant certiorari to resolve these conflicts among the State and federal courts. A thorough analysis would surely agree with this: "Dispassionate scholarship suggests quite strongly that the right of the people to keep and bear arms meant just that." Justice Antonin Scalia, A MATTER OF INTERPRETATION 137 (Princeton 1997).

IV. THE COURTS OF APPEAL ARE IN ADDITIONAL CONFLICT ON WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES THROUGH THE DUE PROCESS AND/OR PRIVILEGES & IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT, AND WHETHER *PRESSER* V. *ILLINOIS*, 116 U.S. 252 (1886), SHOULD BE LIMITED OR

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carrying any deadly weapon, concealed or otherwise, within municipal limits violated the US Second Amendment. *See also State* v. *Nickerson,* 247 P.2d 188, 192 (Mont. 1952)(Adair, J), for a classic home defense case with case law discussion. A fine book that covers the early case law well is CRAMER, FOR THE DEFENSE OF THEMSELVES AND THE STATE (Praeger 1994).

The Second Amendment makes no distinction between concealed arms and not. There is considerable evidence of lower crime rates in States where law-abiding citizens may carry concealed defensive weapons and keep others at home. Guns in the hands of law-abiding citizens and at home deter burglars. *See generally* LOTT, JOHN, THE BIAS AGAINST GUNS (Regnery 2003), GUN CONTROL & GUN RIGHTS (N.Y.U.: McClurg, Kopel, & Denning eds. 2002), POE, RICHARD, THE SEVEN MYTHS OF GUN CONTROL (Random House: Prima 2001), WATERS, ROBERT A., GUNS SAVE LIVES (WA: Loompanics.com 2002).

[24] *See* Kopel, *What State Constitutions Teach About the Second Amendment,* 29 NO. KY. L. REV. 827 (2002), Volokh, *The Commonplace Second Amendment,* 73 N.Y.U. L. REV. 793 (1998).

OVERRULED, AND A FORM OF INCORPORATION INTO THE DUE PROCESS CLAUSE APPLIED, OR A *SAENZ* V. *ROE* (US 1999)[25] ANALYSIS UTILIZED.

An important issue splitting US Courts of Appeal is *how* the Second Amendment applies to the States. One approach is the due process clause of Amendment XIV. Another is the privileges and immunities clause. A third is to follow *Presser* v. *Illinois*[26] of the 1886 Court, a time of many discredited decisions, such as *Plessy* v *Ferguson*[27] and *Bradwell* v. *The State*.[28] On this point *Silveira* and *Emerson* agree, but there is abundant discord with other Circuits, the Fourth and Seventh. *See Love* v. *Pepersack*, 47 F.3d 120 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995)(Second Amendment not applicable), *Quilici* v. *Village of Morton Grove*, 695 F.2d 261 (7th Cir.)(2-1)(follows *Presser*), *cert. denied*, 464 U.S. 863 (1983).

Justice Brennan with characteristic understatement observed: "Many still believe that the dissenting opinion in the *Slaughterhouse Cases* expressed the sounder view." Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 767 (1961).

Silveira and *Emerson*, and other judges on the Ninth Circuit reject *Presser* v. *Illinois*, and *US* v. *Cruikshank*, both *supra*, as no longer authoritative. *Silveira* states:

"we are in agreement with the Fifth Circuit ... that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13." *Silveira*, 312 F.3d at 1067 n.17.[29]

Only "some" of the Ninth Circuit, however, rejects *Cruikshank* and *Presser*. Directly contrary to *Silveira* is

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25 526 U.S. 489, 503-04 (1999).
26 116 U.S. 252 (1886).
27 163 U.S. 537 (1896).
28 83 U.S. 130 (1873).
29 *Emerson*, a federal case, did not involve incorporation.

Fresno RPC v. *Van de Kamp*, 965 F.2d 723 (9th Cir. 1992)(Second Amendment does not apply).

Highest courts of more than one State have refused to apply the Second Amendment. New Hampshire now has its own broad "right [of persons] to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. Pt I, art 2-A (1982), and applies the article with strict scrutiny, as in *State* v. *Smith*, 571 A.2d 279 (N.H. 1990)(Johnson, J).[30] Other examples are: *Harris* v. *State*, 432 P.2d 929 (Nev. 1967), *Commonwealth* v. *Davis*, 343 N.E.2d 847 (Mass. 1976), *State* v. *Friel*, 508 A.2d 123 (Me. 1986).

To place the importance of these issues in context, consider if **nine** Circuits and four State high Courts decided *not* to apply the First and Fourth Amendments to the States. Would such cases be certworthy?[31]

A. INCORPORATION FOLLOWING *BENTON* AND *DUNCAN*

The usual and well-settled jurisprudence for applying an Amendment to the States is explained in *Benton* v. *Maryland*, 395 U.S. 704 (1969), following *Duncan* v. *Louisiana*, 391 U.S. 145 (1968):

"[T]he Fifth Amendment represents a fundamental ideal in our constitutional heritage.... [It] ... should apply to the

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30 Earlier, New Hampshire upheld a conviction for unlicensed mere possession of pistols in *State* v. *Sanne*, 364 A.2d 630 (N.H. 1976). The accused, however, had no appellate counsel in this firearms possession case to argue for incorporation. The State was well represented by a gentleman named Souter.

31 There was a lingering unargued right to keep minor arms issue here recently in *Bunkley* v. *Florida*, 123 S Ct ___ (2003)(per curiam). Bunkley carried a closed pocket knife with a ~2½ inch blade. This is no different from the innocuous Swiss Army knife carried by millions for numerous purposes, including use of its screwdriver and bottle opener. *See* www.swiss-knife.com. The "original" Swiss model has a 3¾ in. blade. Some have clippers, scissors, a compass, whistle, and spotlight, all useful for self defense and survival, as well as peeling oranges in Florida. Yet in Florida innocent possession can be the difference between five years versus **life** because that simple right of having minimal self protection has not been recognized.

States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled." 395 U.S. at 794.

The individual right to keep and bear arms – Second Amendment - also is "a fundamental ideal in our constitutional heritage." To the extent that *Presser* undercuts the Second Amendment, so too should *Presser* be finally overruled. *Presser* is even more vulnerable in reasoning than *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), overruled last Term.

B. INCORPORATION FOLLOWING *SAENZ* AND *DOE*

At least three generations of law students and constitutional lawyers have understood that the *Slaughterhouse Cases*, 83 U.S. 36 (1873)(5-4), and *United States* v. *Cruikshank*, 92 U.S. 542 (1876), were not well considered.[32] It is no coincidence that *Slaughterhouse* in the Reports sits next to *Bradwell* v. *The State*, 83 U.S. 130 (1873), another legacy of then judicial disregard for the Fourteenth Amendment and individual rights.[33] Dissenting Justice Noah Swayne

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[32] Modern persuasive scholarly analysis of the Fourteenth Amendment and privileges and immunities clause includes: MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (Duke 1986), MEYER, THE AMENDMENT THAT REFUSED TO DIE (Madison 2000), SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION (Greenwood Press 2000), Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993), Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103 (2002), Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C.L. REV. 1071 (2000), Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992). The recent book by Judge Sneed of the Ninth Circuit covers the material well. *See* SNEED, JOSEPH T. III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN – AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997).

[33] *Bradwell* allowed the State of Illinois to exclude women as a class from the practice of law, regardless of demonstrated skills, natural talent, and considerable education, as well as licensure in other States. The reasoning was minimalist. *Bradwell* follows *Slaughterhouse* in the pages of 83 U.S. Reports.

observed in *Slaughterhouse* that the majority turned "what was meant for bread into a stone." 83 U.S. at 129. One need not be a constitutional scholar to shudder at the reasoning and reality of *Slaughterhouse* and *Cruikshank*. They gutted the privileges or immunities clause, leaving next to no protection for the lives and liberty of freedmen, freedwomen, and those who supported their cause.[34]

Cruikshank did so following the murderous "Colfax massacre" in Louisiana of freedmen.[35] Federal prosecutors charged Klansmen with conspiracy to prevent blacks from exercising civil rights, including the rights to vote and to bear arms for defense of their community. *Cruikshank* freed the Klansmen to ride again, with no mention of the massacre.

Decades after *Cruikshank*, this Court used the due process clause of the Fourteenth to strengthen individual rights against oppressive state action, by incorporating most of the Bill of Rights into due process, one by one, and also recognizing home and family rights, as in *Troxel* v. *Granville*, 530 U.S. 57 (2000)(fundamental family rights).

Saenz v. *Roe*, 526 U.S. 489 (1999), is important here. *Saenz* recalled that "Justice Stewart reminded

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[34] MEYER, THE AMENDMENT THAT REFUSED TO DIE 64-67, 74-94 (Madison 2000), is a thorough short study of the history and errors of both the *Slaughterhouse* and *Cruikshank* cases.

[35] *Cruikshank* ignored the brutal facts of the Colfax Massacre, which today would be considered crimes against humanity. The HARPWEEK website contains this concise summary: "The second worst incident of violence was the Colfax Massacre of April 13, 1873. The fighting left ... 70 black men dead, with half ... killed after they surrendered. Federal officials arrested and indicted over 100 white men. They were later freed, however, when the U.S. Supreme Court ruled that the basis for their prosecution (part of the 1870 enforcement act) was unconstitutional." http://blackhistory.harpweek.com/7Illustrations/Reconstruction/GatheringTheDead.htm. *See generally* VANDAL, RETHINKING SOUTHERN VIOLENCE: HOMICIDES IN POST-CIVIL WAR LOUISIANA, 1866-1884 (Ohio State 2000), HOLLANDSWORTH, AN ABSOLUTE MASSACRE: NEW ORLEANS RACE RIOT OF JULY 30, 1866 (L.S.U. 2001).

us in *Shapiro* v. *Thompson*, 394 U.S. 618, 643 (1969), [that] the right [to travel] is so important that it is 'assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution ....'"(concurring opinion). In *Silveira* we have the *explicit* Second Amendment right, protected by both the due process and privileges & immunities clauses of the Fourteenth Amendment. All of the authorities from varying venues cited in footnotes 18, 26 & 37 agree, as well as Blackstone, and Cooley. Amar states:

"[T]he framers of the Fourteenth Amendment strongly believed in an individual's right to own and keep guns for self-protection. Blacks and Unionists down South could not always count on the local police to keep white night-riders at bay. When guns were outlawed, only Klansmen would have guns. Thus, the Reconstruction Congress made quite clear that a right to keep a gun at home for self-protection was indeed a constitutional right -- a true 'privilege' or 'immunity' of citizens."[36]

The *Cruikshank* Court restored the Klan and supporting lawless officialdom to power. This Court can undo that wrong.[37]

V. THE COURTS OF APPEAL & CITIZENS HAVE HAD *NO* DIRECT SECOND AMENDMENT GUIDANCE FROM THIS COURT SINCE THE SEVERELY CRITICIZED 1939 OPINION OF JUSTICE JAMES MCREYNOLDS IN *US V. MILLER*, WELL OVER 60 YEARS AGO, DESPITE THE PROLIFERATION OF FIREARMS LAWS & LITIGATION. *MILLER* SHOULD BE CAREFULLY RECONSIDERED BECAUSE IT: (A) BADLY MISREADS HISTORY, (B) THE *MILLER* COURT CASUALLY

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[36] Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103, 110 (2002).

[37] The State action ignored in *Cruikshank* was the failure of the State to provide equal police protection to freedmen, as well as the active participation of local lawmen who were accomplices in the massacre and homicides. *See* VANDAL and HOLLANDSWORTH, *supra* note 40. The mass killings at Colfax were not unlike some recent scenes in Bosnia that have been prosecuted at the Hague.

DENIED COUNSEL TO MILLER IN A RUSH TO JUDGMENT WITHIN A MATTER OF ONLY A FEW WEEKS, DURING WHICH TIME THE MILLER SIDE HAD NO COUNSEL, BRIEF OR ARGUMENT, & (C) THE *MILLER* DECISION HAS CREATED INCONSISTENCY AND CONFUSION IN THE LOWER COURTS, APART FROM BEING A PLAIN MISCARRIAGE OF JUSTICE.

Recent scholarship on Justice James McReynolds and *United States* v. *Miller*[38] painfully exposes the inadequacies of the decision, as well as the Justice's unparalleled record of opinions systematically upholding every form of abridgment of fundamental rights. Those negative decisions ranged from racism in education[39], the judicial system[40], and voting,[41] to denial of First Amendment rights.[42] McReynolds even refused to sign the Memorial to Justice Brandeis or attend his funeral, so rigid was McReynolds' anti-Semitism. 306 U.S. at vi.[43]

That other Justices did not write in *Miller*, and concurred silently at the hurried end of the Term speaks nothing of the result if the case had been briefed and argued in a normal objective way. The other Justices had some **30** additional full opinions to

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[38] 307 U.S. 174 (1939). A thorough exposition of the *Miller* confusion is Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and The Second Amendment*, 26 CUMBERLAND L. REV. 961 (1996)(analysis of misapplications of *Miller* in the US Courts of Appeal). *See also* Gardiner, *The Second Amendment and the U.S. Courts of Appeal*, 29 NO. KY. L. REV. 805 (2002).

[39] McReynolds, for example, dissented in the law school racial desegregation case of *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 353 (1938), although the State had no black law school at all.

[40] Justice McReynolds did not attend argument in the Scottsboro cases. See *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935).

[41] McReynolds would have sanctioned the voting discrimination against blacks found in *Lane* v. *Wilson*, 307 U.S. 268 (1939).

[42] He dissented against applying the First Amendment to the States in *Stromberg* v. *California*, 283 U.S. 359, 370 (1931).

[43] *See* THE FORGOTTEN MEMOIR OF JOHN KNOX (Univ of Chicago: Hutchinson & Garrow eds. 2002). Online material includes: www.michaelariens.com/ConLaw/justices/mcreynolds.html.

write in the few weeks before the Term ended on June 5, 1939. Moreover, in that era, dissent was strongly discouraged. Some 80% of decisions were unanimous. The rare dissent was usually noted, without an opinion. *See* MICHAEL E. PARRISH, THE HUGHES COURT: JUSTICES, RULINGS, & LEGACY, Table 1.2 at 25 (ABC-CLIO 2002). An example of a unanimous *Miller*-era decision by this Court that was later overturned would be *Commonwealth* v. *Gardner*, 15 N.E.2d 222 (Mass), *appeal dismissed*, 305 U.S. 559 (1938)(per curiam), overruled *de facto* in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

This Court should grant certiorari to remedy the inadequacies of *United States* v. *Miller*, 307 U.S. 174 (1939), and to replace that flawed and ambiguous McReynolds opinion with well-reasoned principles to guide citizens and the lower courts. *Miller* misstates and misunderstands law and history repeatedly. The government argued in its unopposed *Miller* brief that:

"... [T]he carrying of weapons was always a crime under the common law of England and of this country."[44]

That claim, however, is untrue and contradictory. The authoritative writings of Blackstone, Rawle, Justice Story, Cooley, and English historical documents and treatises demonstrate overwhelmingly that the carrying of weapons was *not* generally a crime under the common law of England or of this country. Historian-lawyer David Hardy carefully details this background in his valuable book ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 & *passim* (Blacksmith, AZ 1986). Hardy notes:

"Yet more recent historians have traced the individual legal duty to own arms and be skilled in their use to 690 A.D., and concluded that it is in fact 'older than

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[44] Brief of the United States, *United States* v. *Miller*, at 4 (US, October Term 1938, No. 696).

our oldest records.' J BAGLEY & P ROWLEY, I A DOCUMENTARY HISTORY OF ENGLAND 152." [45]

Typically in those ancient years the possession of arms was never a crime, unless there was a factor of monarchial, parliamentary, or religious persecution-discrimination. Our Founders generally frowned upon such a legal rationale, and many British traditions. Also, there might be an offense if the carrier of arms were menacing the populace, rather than carrying for self or other defense. Hardy, *supra,* and Joyce Lee Malcolm develop this historical material well.[46] The government and Justice McReynolds did not.

Madison pointed out in THE FEDERALIST NO. 46 that Americans possess "the advantage of being armed ... [unlike] the people of almost every other nation ...." Moreover, other "governments are afraid to trust the people with arms."[47] The British were different. Parliament and Monarchs ruled. It is incongruous to rely upon English statutory law spawned by a haphazard hereditary monarchy, when that very law sought to suppress the American Revolution by disarming and shooting at our nation's Founders.

Blackstone stated in his 1803 COMMENTARIES:[48]

"5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence ...."

"[It] is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."

"... the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire ...."

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45 DAVID HARDY, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT 12 (Blacksmith, AZ 1986).

46 *See* MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (Harv. 2002).

47 THE FEDERALIST No. 46, at 335 (N.Y.: Wright ed. 1961).

48 II Blackstone, The Rights of Persons, in COMMENTARIES bk. 1, c. I, 127, 143, 144 (1803).

The *Miller* opinion cites BLACKSTONE,[49] but the wrong chapter, and for an irrelevant proposition. The most often quoted errant paragraph from *Miller* states:

"In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette* v. *Tennessee*, 2 Humphr 154, 158 (Tenn. 1840)." 307 U.S. at 178.

If such evidence were constitutionally significant to a Second Amendment analysis, the Court could have remanded for further findings, or researched the topic of shotguns used in military and defensive engagements. More than enough historical material exists for an impressive book, namely SWEARENGEN, IV THE WORLD'S FIGHTING SHOTGUNS (Alex. Va.: Ironside Publ. 1978)(available in DC at Borders). The Court would have found that short-barreled shotguns were legitimately useful from pre-Revolutionary times to date, as can be developed with judicial notice materials in the briefs to follow.[50] Mr. Miller's shotgun would be quite effective in defending a household from invasion by multiple combatants, gangs, or terrorists at close range. Justice McReynolds made erroneous bare assumptions without evidence, knowledge, or judicial notice materials. The Justice invented the militia-useful suggestion, without any historical or textual authority, or study of weaponry, military or otherwise. Moreover, the indictment did not charge

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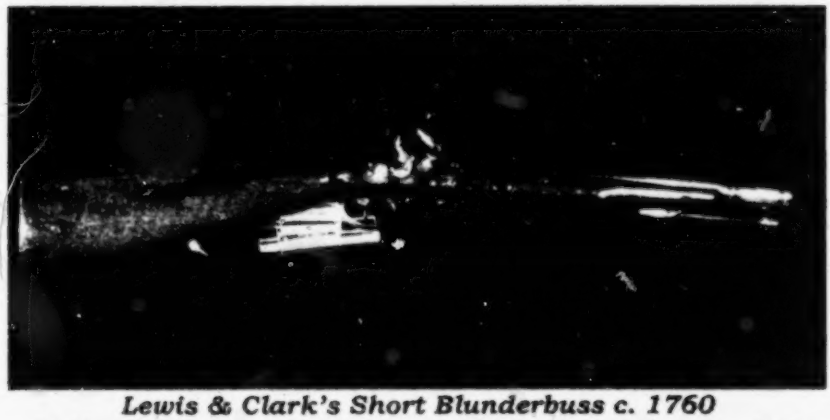
[49] Justice McReynolds cites BLACKSTONE'S COMMENTARIES, Vol. 2, Ch. 13, p. 409 on King Alfred. *Miller*, 307 U.S. at 179.

[50] An excellent article on short shotguns in American history, and the material missed completely by Justice McReynolds is Puckett, *United States* v. *Miller* and Short-Barreled Shotguns (2003)(essay – publication pending).

Miller with having a firearm unrelated to potential personal or common defense, much less a militia connection.

Justice McReynolds does observe that "ordinarily when called for service these [Militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[51] Bostonians had blunderbusses for defense against the British, who tried to confiscate them! *See* RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON 95 (N.Y.: DaCapo Press 1970 ed.) Lewis & Clark armed themselves with blunderbusses, the 1803 version of a short-barreled shotgun, for protection from Natives and Bears.



Lewis & Clark's Short Blunderbuss c. 1760
National Museum of American History, Washington, D.C.
www.loc.gov/exhibits/lewisandclark/images/lcp0041s.jpg

Justice McReynolds cites in a final footnote three "important opinions and comments by writers."[52] McReynolds mistakenly cited the Story discussion of a militia, not of "the right of the citizens to keep and bear arms." McReynolds also cited the wrong Cooley treatise. Cooley's pertinent work, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898), explains:

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51 *Miller*, 307 U.S. at 179.

52 His specific cite is: "Cooley's Constitutional Limitations, Vol 1, p 729; Story on The Constitution, 5th Ed, Vol 2, p. 646." 307 U.S. at 182 n.3. The *Miller* opinion has only three footnotes.

"*The Right is General.* -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. ... The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."

The historical and legal authorities he cited - Story and Cooley - both flatly contradict his holding and military connection. The absence of quality in the reasoning and historical analysis of *Miller* is another reason why the case should be revisited and overruled. *Compare Lawrence* v. *Texas,* 539 U.S. ___ (2003)(Slip op. 7-17)(critique of *Bowers* decision).

UNWARRANTED DENIAL OF COUNSEL & ARGUMENT TO *MILLER*, AND RUSH TO JUDGMENT

The report of *Miller*, 307 U.S. 174, 175 (1939), recites only Gordon Deans' appearance, seven other government lawyers on the brief, and no representation at all for Miller. This was a denial of appellate counsel and argument. The hurried events are documented in the National Archives case file. The Court nonetheless noted probable jurisdiction (and heard oral argument 17 days later!).

The Clerk on March 15, 1939, wrote to Miller's previous Arkansas trial counsel, Paul Gutensohn, stating that he should appear March **31** for oral argument.[53] That allowed hardly two weeks for the drafting and printing of a full brief, preparation for oral argument, and travel. Counselor Gutensohn replied March 22 that he had not even received the

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53 Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 15, 1939, NATIONAL ARCHIVES, SUPREME COURT CASE RECORDS, *United States* v. *Miller,* October Term 1938, No. 696. The Court actually heard argument March 30. If Gutensohn had appeared March 31 as directed, he would have been a day late.

brief of the government, nor the record.[54] He had only been court-appointed trial counsel. Clerk Cropley responded March 25, five days before the scheduled argument, that Gutensohn should file a brief early the next week.[55] Gutensohn replied March 28 with a Western Union telegram stating: "SUGGEST CASE BE SUBMITTED ON APPELLANTS BRIEF. UNABLE TO OBTAIN ANY MONEY FROM CLIENTS TO BE PRESENT AND ARGUE CASE = PAUL E GUTENSOHN."[56] This was against the interests of his clients. Jack Miller, accordingly, did not have a brief or any representation at the oral argument on March 30, 1939. The Chief Justice did not pass the case and inquire about the absence of counsel, or appoint other counsel to undertake representation for reargument.

The railroad rush, the absence of briefing, and the failure to appoint counsel, all diminish *Miller* as a credible precedent. The case was a classic miscarriage of justice, unthinkable today. It was no *Gideon.*

The defining issue here is whether an indigent appellee, in a government appeal to the Supreme Court, is entitled to appointed counsel. *Hardy* v. *United States,* 375 U.S. 277 (1964), for example, squarely held that an indigent defendant convicted in the District of Columbia had a federal constitutional right to a complete transcript on appeal to the US Court of Appeals. The Court appointed counsel when the trial lawyer withdrew.

Recent decisions on ineffective counsel also support this analysis of *Miller* as a defective decision, such as *Roe* v. *Flores-Ortega,*[57] and *Penson* v. *Ohio.*[58]

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54 Letter, Paul E Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 22, 1939, Id.

55 Letter, Charles Elmore Cropley, Clerk, to Paul E. Gutensohn, Esq, Mar. 25, 1939, Id.

56 Telegram, Paul E. Gutensohn, Esq, to Charles Elmore Cropley, Clerk, Mar. 28, 1939, Id.

57 528 U.S. 470, 481-483 (2000)(failure to file notice of appeal held ineffective).

The *Miller* case was an instance of "the forfeiture of a proceeding itself." *Roe*, 528 U.S. at 483. This Court surely must not allow *Miller* to remain as authority for any point of law, much less the sole [**mal**]interpretation of a key right in the Bill of Rights, the Second Amendment.

VI. THE COURTS OF APPEAL ARE IN DISARRAY ON WHETHER TO APPLY A HEIGHTENED STANDARD OF REVIEW IN SECOND AMENDMENT CASES. EXPRESS FUNDAMENTAL RIGHTS ARE DIRECTLY INVOLVED AND SHOULD RARELY BE LIMITED, AND THEN ONLY FOR THE MOST COMPELLING OF JUSTIFICATIONS.

Petitioners suggest a heightened standard of review in all Second Amendment cases, as with the First Amendment, because express fundamental rights are at risk. Beyond that is the further right to protect and defend home and family, recognized in the cases leading up to *Troxel* v. *Granville*, 530 U.S. 57 (2000). The heightened scrutiny applied in *Troxel* is appropriate.[59] Protecting family and children are core purposes of the Second Amendment. Violent home invasions take place on a serious scale, as do assaults upon citizens in their workplaces. Indeed, because of the risk of violence, both defendants have taxpayer-paid armed bodyguards, as do many other California officials.[60] The rounding up of guns from private homes, facilitated by gun registration, leaves families defenseless against burglary, gangs, violent civil disorder, and terror, unless they have exceptional

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[58] 488 U.S. 75, 88-89 (1988)(claim that counsel did not represent defendant on appeal).

[59] While *Lawrence* v. *Texas*, *supra*, did not discuss standard of review at length, the Court relied upon a number of strict scrutiny decisions such as *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). Those apply with greater strength here because the Second Amendment is an express fundamental right.

[60] The Associated Press in August 2000 reported: "Among all the states, only California provides bodyguards to all its statewide officials .... More than $31 million this year .... California Attorney General Bill Lockyer is protected by special agents ...."

wealth or hold high office. Civil disorders such as those in D.C. and L.A. from time to time especially show the need for business owners to have deterrent defensive weapons to prevent looting and arson.

Historically, gun registration has led to confiscation and attendant horrors. Judge Kozinski notes this in his dissenting opinion below. 327 F.3d at 568-70. (**App.** at 4A-6A). The well-researched book, GUN CONTROL: GATEWAY TO TYRANNY – THE NAZI WEAPON LAW 18 MARCH 1938, J. Simkin & A. Zelman (1992), also documents how the SS inherited lists of firearm owners and their arms in March 1933. The SS used these lists to seize privately held firearms from persons who were not considered to be "reliable." *See* www.jpfo.org/GCA_68.html.

Private firearms in the hands of 6 million European Jews would have altered the course of history for many of our ancestors who did not survive.

As the concurring opinion of Justice Thomas in *Troxel* reminds, "strict scrutiny [applies] to infringements of fundamental rights." 530 U.S. at 80. A heightened standard of review would clarify Second Amendment jurisprudence immensely and align it with First Amendment practice that is closely analogous.

VII. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE US COURT OF APPEALS IN *SILVEIRA V. LOCKYER*, 312 F.3d 1052 (9th Cir 2003), AND REMAND FOR FURTHER PROCEEDINGS, INCLUDING AN ASSESSMENT OF REASONABLE INTERIM COUNSEL FEES UNDER 42 U.S.C. §1988 PRIOR TO TRIAL OF THE REMAINING FACTUAL QUESTIONS.

If Petitioners prevail in this Court sufficiently on the issues set out above, they will have assisted the Court in sorting out the law of the Second and Fourteenth Amendments from the past 64 years. As substantially prevailing parties, Petitioners should receive costs, reasonable counsel fees, and

appropriate litigation expenses under §1988.

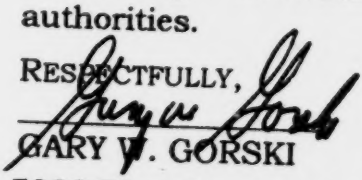
This would fit the requirement from *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980)(per curiam), that: "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Prevailing on the principal questions presented by this Petition would be a far greater victory than an award of nominal damages, sufficient in *Farrar* v. *Hobby*, 506 U.S. 103 (1992). *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), applies. This Court should order that the fees be assessed before other proceedings below on remand.

CONCLUSIONS

For the reasons set out, this Court should grant the petition for writ of certiorari, reverse the judgment of the US Court of Appeals in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2003), and remand.

This would be the first Second Amendment appeal to be heard since 1939. The case presents several complex and important constitutional questions. Petitioners suggest that the Court allow two and one-half hours for oral argument and 75 pages for briefs, with permission to file appendices (8.5 x 11) containing essential historical documents and authorities.

RESPECTFULLY,



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GATHERING THE DEAD AND WOUNDED
Harpers, May 10, 1873
(After the Colfax Massacre, before *US* v. *Cruikshank* - RL)

APPENDIX TO PETITION FOR CERTIORARI

All opinions now are officially reported.
312 F.3d 1052 & 328 F.3d 567.

ORDER OF THE US COURT OF APPEALS, MAY 6, 2003, DENYING REHEARING EN BANC: SIX DISSENTS, AND FOUR OPINIONS

***SILVEIRA* v. *LOCKYER*,**
328 F.3d 567 (9th Cir. May 6, 2003)

SEAN SILVEIRA; et al, *Plaintiffs-Appellants,*
v.
BILL LOCKYER, et al, *Defendants-Appellees.*
No. 01-15098

ORDER
Filed May 6, 2003

Before: Stephen Reinhardt, Frank J. Magill,* and Raymond C. Fisher, Circuit Judges.

Dissents by Judges Pregerson, Kozinski, Kleinfeld, and Gould.

*The Honorable Frank J. Magill, Senior Circuit Judge, Eighth Circuit, sitting by designation.

A majority of the panel has voted to deny the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

PREGERSON, Circuit Judge, dissenting from the denial of rehearing en banc:

I agree with the panel's decision to uphold California's Assault Weapons Control Act. But I part from the panel's Second Amendment analysis. The right to keep and bear arms is in no way absolute; it is subject to reasonable restrictions such as those embedded in the statute the California legislature enacted. However, the panel misses the mark by interpreting the Second Amendment right to keep and bear arms as a collective right, rather than as an individual right. Because the panel's decision abrogates a constitutional right, this case should have been reheard en banc.

KOZINSKI, Circuit Judge, dissenting from denial of rehearing en banc:

Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech, or . . . the press" also means the Internet, *see Reno* v. *ACLU*, 521 U.S. 844 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, *see Katz* v. *United States*, 389 U.S. 347 (1967). When a particular right comports

especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases—or even the white spaces between lines of constitutional text. *See, e.g.*, *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington* v. *Glucksberg*, 521 U.S. 702 (1997). But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there.

It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more static approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

The able judges of the panel majority are usually very sympathetic to individual rights, but they have succumbed to the temptation to pick and choose. Had they brought the same generous approach to the Second Amendment that they routinely bring to the First, Fourth and selected portions of the Fifth, they would have had no trouble finding an individual right to bear arms. Indeed, to conclude otherwise, they had to ignore binding precedent. *United States* v. *Miller*, 307 U.S. 174 (1939), did *not* hold that the defendants lacked standing to raise a Second Amendment defense, even though the government argued the collective rights theory in its brief. *See* Kleinfeld Dissent at 6011-12; *see also* Brannon P. Denning &

Glenn H. Reynolds, *Telling* Miller's *Tale: A Reply to David Yassky*, 65 Law & Contemp. Probs. 113, 117-18 (2002). The Supreme Court reached the Second Amendment claim and rejected it *on the merits* after finding no evidence that Miller's weapon—a sawed-off shotgun—was reasonably susceptible to militia use. *See Miller*, 307 U.S. at 178. We are bound not only by the outcome of *Miller* but also by its rationale. If Miller's claim was dead on arrival because it was raised by a person rather than a state, why would the Court have bothered discussing whether a sawed-off shotgun was suitable for militia use? The panel majority not only ignores *Miller*'s test; it renders most of the opinion wholly superfluous. As an inferior court, we may not tell the Supreme Court it was out to lunch when it last visited a constitutional provision.

The majority falls prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. *See Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393, 417 (1857) (finding black citizenship unthinkable because it would give blacks the right to "keep and carry arms wherever they went"). A revolt by Nat

Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.

All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. *See* Kleinfeld Dissent at 5997-99. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh in their minds, and they spelled it out clearly so it would not be forgotten. Despite the panel's mighty struggle to erase these words, they remain, and the people themselves can read what they say plainly enough:

A well regulated Militia, being necessary to the security of a free State, *the right of the people to keep and bear Arms, shall not be infringed.*

The sheer ponderousness of the panel's opinion—the mountain of verbiage it must deploy to explain away these fourteen short words of constitutional text—refutes its thesis far more convincingly than anything I might say. The panel's labored effort to smother the Second Amendment by sheer body weight has all the grace of a sumo wrestler trying to kill a rattlesnake by sitting on it—and is just as likely to succeed.

KLEINFELD, Circuit Judge, with whom Circuit Judges **KOZINSKI**, **O'SCANNLAIN**, and **T. B. NELSON** join, dissenting from denial of rehearing en banc:

I respectfully dissent from our order denying rehearing en banc. In so doing, I am expressing agreement with my colleague Judge Gould's special concurrence in *Nordyke v. King*,[1] and with the Fifth Circuit's opinion in *United States v. Emerson*,[2] both taking the position that the Second Amendment secures an individual, and not collective, right to keep and bear arms.

The panel opinion holds that the Second Amendment "imposes no limitation on California's [or any other state's] ability to enact legislation regulating or prohibiting the possession or use of firearms"[3] and "does not confer an individual right to own or possess arms."[4] The panel opinion erases the Second Amendment from our Constitution as effectively as it can, by holding that no individual even has standing to challenge any law restricting firearm possession or use. This means that an individual cannot even get a case into court to raise the question. The panel's theory is that "the Second Amendment affords only a collective right,"[5] an odd deviation from the individualist philosophy of our Founders. The panel strikes a novel blow in favor of states' rights, opining

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[1] 319 F.3d 1185 (9th Cir. 2003).

[2] 270 F.3d 203 (5th Cir. 2001).

[3] Silveira v. Lockyer, 312 F.3d 1052, 1087 (9th Cir. 2002).

[4] Id. at 1056.

[5] Id. at 1092.

that "the amendment was not adopted to afford rights to individuals with respect to private gun ownership or possession,"[6] but was instead "adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms."[7] It is not clear from the opinion whom the states would sue or what such a suit would claim were they to try to enforce this right. The panel's protection of what it calls the "people's right to bear arms" protects that "right" in the same fictional sense as the "people's" rights are protected in a "people's democratic republic."

Our circuit law regarding the Second Amendment squarely conflicts with that of the Fifth Circuit.[8] It is inconsistent with decisions of the Supreme Court that have construed the Second Amendment and phrases within it.[9] Our circuit has effectively repealed the Second Amendment without the democratic protection of the amendment process, which Article V requires.[10]

The panel decision purports to undertake historical analysis. Historical context has its uses in understanding the context and purposes of any law, constitutional or legislative,[11] but like legislative history, the use of history is subject to abuse. Where the historical scholarship is partial and tendentious, relying on it becomes like relying on legislative history:

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[6] Id. at 1087.

[7] Id. at 1086.

[8] See United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

[9] See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), United States v. Miller, 307 U.S. 174 (1939).

[10] U.S. Const. art. V (describing amendment procedure).

[11] See Portland 76/Auto Truck Plaza v. Union Oil, 153 F.3d 938, 944 (9th Cir. 1998) ("The statute and not the legislative history tells us what solution Congress adopted for the problem, but the legislative history is useful to determine what the problem was.").

"entering a crowded cocktail party and looking over the heads of the guests for one's friends."[12]

Much of the panel decision purports to be an attempt to figure out what the word "militia" means in the Second Amendment. But the panel's failure to cite the contemporaneous implementing[13] statute defining the term demonstrates the tendentiousness of its analysis. The statute defining the militia, which in substance provides that the "militia" consists of all adult male citizens without regard to whether they are in any state or federal military service, has been subsequently altered to expand its coverage, but the federal militia statute remains in effect.[14] Besides overlooking the statute, the panel somehow failed to notice that the United States Supreme Court, in *United States v. Miller,*[15] held that the term "militia" in the Second Amendment meant, and means, "all males physically capable of acting in concert for the common defense." We are an inferior court, bound by this holding of the Supreme Court.

The panel opinion swims against a rising tide of legal scholarship to the contrary, relying heavily on a single law review article that claims "keep and bear" means the same thing as "bear," which itself means only to carry arms as part of a military unit.[16]

About twenty percent of the American population, those who live in the Ninth Circuit, have lost one of the ten amendments in the Bill of Rights. And, the methodology used to take away the right threatens the rest of the Constitution. The most extraordinary step

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[12] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

[13] Congress voted to send the Bill of Rights to the states in September 1789, and it was ratified by the states on December 15, 1791. The Militia Act was enacted in 1792.

[14] See Militia Act, 1 Stat. 271 (1792); 10 U.S.C. § 311.

[15] 307 U.S. 174, 179 (1939).

[16] Silveira, 312 F.3d at 1074 (citing Michael C. Dorf, What Does the Second Amendment Mean Today?, 76 Chi.-Kent L. Rev 291, 294 (2000)).

taken by the panel opinion is to read the frequently used Constitutional phrase, "the people," as conferring rights only upon collectives, not individuals. There is no logical boundary to this misreading, so it threatens all the rights the Constitution guarantees to "the people," including those having nothing to do with guns. I cannot imagine the judges on the panel similarly repealing the Fourth Amendment's protection of the right of "the people" to be secure against unreasonable searches and seizures,[17] or the right of "the people" to freedom of assembly,[18] but times and personnel change, so that this right and all the other rights of "the people" are jeopardized by planting this weed in our Constitutional garden.

I.

The Constitution with its amendments is the supreme law of this land, not historical artifact, so we must read it, determine what it means, and follow it, regardless of our policy preferences. The Second Amendment to the Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[19] To figure out what the Second Amendment means, we should apply standard and commonly accepted rules of statutory and constitutional construction, such as the rule that all the words must ordinarily be given force. The forceful language in the operative language in the Amendment, "the right of the people to keep and bear Arms, shall not be infringed," is quite clear, as will be set out below. The statement of the purpose preceding these operative words, "A well regulated Militia, being necessary to the security of a free State," makes the conclusion unavoidable, once "militia" is read

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[17] U.S. Const. amend. IV.
[18] U.S. Const. amend. I.
[19] U.S. Const. amend. II.

seriously, that the operative words guarantee an individual right.

The panel's strongest argument (but not strong enough) is that the word "bear" in the phrase "bear Arms" "customarily relates to a military function," so that when not acting in a military capacity, "the people" have no right to bear Arms.[20] The military meaning is certainly among the meanings of "bear," as is "large, heavily built, furry, four-legged mammal," and "investor pessimistic about the stock market." But the primary meaning of "bear" is "to carry,"[21] as when we arrive at our host's home "bearing gifts" and arrive at the airport "bearing burdens." The only way to limit "bear" to its military meaning is to misread "militia" in the preamble as though it meant regulars in a standing military service, which, as shall be shown below, it emphatically does not.

Of course one can cherry-pick dictionary definitions, just as one can carefully select from legislative and other history. The panel opinion cites a law review article citing the *Oxford English Dictionary*, and asserts that the OED "defines 'to bear arms' as 'to serve as a soldier, do military service, fight.' "[22] This is correct as far as it goes,[23] but it is also misleading, because the OED says that the "main sense"[24] of "bear" is "to carry."[25] True, sense 6(a) of "bear" in the OED is "To carry about with one, or wear, ensigns of

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20 Silveira, 312 F.3d at 1072-75.

21 See 2 Oxford English Dictionary 20 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

22 Silveira, 312 F.3d at 1073 (citing David Yassky, The Second Amendment: Structure, History and Constitutional Change, 99 Mich. L. Rev. 588, 619 (2000) (internal citation omitted)).

23 Oxford English Dictionary 634 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

24 The Oxford English Dictionary divides meanings broadly into "senses." See id. at xxxviii - xxix.

25 2 Oxford English Dictionary 20 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989).

office, weapons of offence or defence,"[26] and the OED lists among the fourth sense of "arms," "to bear arms" — marked as figurative by the editors — defined as "to serve as a soldier, do military service, fight." Certainly the phrase has often been used this way, in judicial opinions and elsewhere. But that does not vitiate the "main sense" of "bear": to carry. The word was used the same way when Congress adopted the Second Amendment. Webster's 1828 Dictionary offers "To support" and "To carry" as the first and second meanings of "bear."[27] If we used the panel's methodology, taking each word according a right in the Bill of Rights in the narrowest possible sense, then we would limit the freedom of "speech" protected by the First Amendment to oral declamations. The right of the people to "bear" arms means, taking the word in its ordinary sense both then and now, the right of the people to "carry" arms, subject as all constitutional rights are to reasonable regulation and restrictions.[28]

The word "keep" poses a much more difficult problem for those who, like the panel, favor judicial repeal of the Second Amendment. While "bear" often has a military meaning, "keep" does not. For centuries, the primary meaning of "keep" has been "to retain possession of."[29] There is only one straightforward interpretation of "keep" in the Second Amendment, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions.

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[26] Id. at 21.

[27] Webster's 1828 Dictionary, available at www.cbtministries.org/resources/webster1828.htm (last visited April 21, 2003).

[28] See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(permitting reasonable restrictions on exercise of right of free speech).

[29] See The American Heritage Dictionary 698 (2d ed. 1982).

The panel claims that "[t]he reason why that term was included in the amendment is not clear."[30] Of course it is not clear to those who have chosen in advance to evade the ordinary meaning of the word. Professing mystification by the meaning of "keep," the panel does a very creative dance around the Founders' language, arguing that because "bear" means only to bear in military service, and "keep" is used in the same "unitary" phrase, "keep" must also be limited to military service.[31] Thus, "keep" means no more than "bear," that is to possess in the course of rendering service in a state militia. The dancers eventually trip up, though, because it is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute."[32] The word "keep" must refer to something different from the word "bear." We, the people, are entitled by its separate meaning and the word "and" to have it construed as giving us a right separate from and additional to the right attached to the word "bear." Calling the phrase "unitary" is just a fancy way of depriving the word "keep" of any force. One might as well say that if someone has a right to keep and drive a car, and dies, his estate loses the right to keep the car because he can no longer drive it.

Colonial statutes, as well as those more recent, used "keep" and "bear" to mean two different things. These statutory usages show that before, during, and after Congress adopted the Second Amendment, "keep" and "bear" were not used in a "unitary" sense, nor was "keep" limited to militia service. For instance, seamen and others exempt from militia service were

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30 Silveira, 312 F.3d at 1074.

31 Id. at 1074.

32 Williams v. Taylor, 529 U.S. 362, 404 (2000) (internal citations and quotations omitted).

sometimes nevertheless required to "keep" arms.[33] Contemporary legal usage in statutes, as well as the plain meaning of the words, shows that law directed at the right or duty to "keep" arms was distinct from duties to "bear" arms in militia service.

II.

The most important phrase for determining the scope of the operative words of the Second Amendment (and the most troublesome to the panel) is "the right of the people." The operative words of the amendment syntactically protect the right of "the people," not the "militia," to keep and bear arms. Despite the panel's extensive discussion of "keep," "bear," and the preamble, it simply skips over "the right of the people" and attempts no direct analysis of the phrase. *Marbury v. Madison* held that "It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."[34] Yet the panel's conclusion that the Second Amendment creates no individual rights whatsoever, only a "collective right" apparently not enforceable by anyone, requires that this clause establishing a "right of the people" be read as though it were "without effect."

The "collective rights" interpretation of the Second Amendment, that it confers a "right" only on state governments with respect to state militias, is a logical and verbal impossibility in light of the phrase "right of the people." As our Constitution is written, governments have "powers" but no "rights." People have both "rights" and "powers." And the Bill of Rights carefully distinguishes between the powers of the states and the rights of the people, never speaking of

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[33] See Don B. Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983).

[34] Marbury v. Madison, 5 U.S. 137, 174 (1803).

rights of the people when it means powers of the states.

The Tenth Amendment expressly draws both distinctions, between powers and rights, and between powers of state governments and powers of the people: "The *powers* not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or* to the people."[35] The Tenth Amendment reserves "powers," not "rights," to the state governments, and the Ninth preserves "rights" for "the people." By use of the word "or," the Tenth Amendment makes it crystal clear that "the people" are distinct from the state governments and hold some reserved powers that the state governments do not. The Ninth Amendment, speaking of "rights" rather than "powers," prohibits a construction that would deny unenumerated "rights" to "the people." Without it, the inference from an express listing of rights might have been that there are no others. The Ninth Amendment does not prohibit such an *expressio unius est exclusio alterius* inference with respect to the state governments, and the Tenth Amendment carefully avoids sorting out which powers are reserved to the states, and which to the people.

The Fifth Circuit conducts this same analysis in *United States v. Emerson*.[36] *Emerson* points out that the Constitution describes what governments exercise as "powers" or "authority."[37] The "legislative Powers" are vested in Congress and the "executive Power" is vested in the President. A "right," however, is *always* exercisable by an individual. Indeed, it was not until recognition of the corporation as a legally cognizable "person" that the concept of an entity other than an individual having constitutional "rights" was even coherent, and the according of "rights" to

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35 U.S. Const. amend. X (emphasis added).

36 270 F.3d 203 (5th Cir. 2001).

37 Id. at 228.

"corporations" was and could be accomplished only by holding that they were "persons."[38]

The panel's holding that the right of "the people" with respect to weapons "was not adopted in order to afford rights to individuals"[39] but only so that "they would have the right to bear arms in the service of the state"[40] is logically absurd. This becomes clear if one interprets the phrase "the people" consistently, as sound construction always requires,[41] and applies the same construction to other amendments. The First Amendment preserves "the right of the people peaceably to assemble."[42] The panel's construction implies that no individual can sue in court for an abridgment of his or her right to assemble, because the right is reserved to the people acting collectively. The Fourth Amendment preserves "the right of the people" to security from unreasonable searches and seizures.[43]

The panel's construction implies that no individual has a right enforceable in court to be free from unreasonable search and seizure, only "the people" as a collective. Because "the people" act collectively through their governments, the panel's logic suggests that the right to free assembly and the right to be free from unreasonable searches and seizures are protected only when people are acting, in the panel's phrase, "in the service of the state." That is not our country.

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[38] See Pembina Consol. Silver Mining & Milling v. Pennsylvania, 125 U.S. 181, 189 (1888).

[39] Silveira, 312 F.3d at 1087.

[40] Id. at 1076.

[41] See, e.g., Dept. of Revenue of Oregon v. ACF Indus., 510 U.S. 332, 342 (1994) (noting the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (quoting Sorenson v. Secretary of Treasury, 475 U.S. 851, 860 (1986)) (internal quotations omitted).

[42] U.S. Const. amend. I.

[43] U.S. Const. amend. IV.

The panel's interpretation is inconsistent with the decision of the Supreme Court in *United States v. Verdugo-Urquidez.*[44] The Supreme Court said that the phrase "the people" "seems to be a term of art" used in the Preamble to the Constitution ("We the People"), Article I § 2 (members of the House are chosen by "the People"), and the First, Second, Fourth, Ninth and Tenth Amendments, with the same meaning in each place. The term "the people" means "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[45] In the usage of the Bill of Rights, a right of "the people" is precisely what the panel says it is not: a right of individuals that, like their right to peaceably assemble and to be free from unreasonable search and seizure, the Constitution entitles them to assert against the government.[46]

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[44] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[45] Id.

[46]The Supreme Court has not determined whether the Second Amendment has been "incorporated" so as to apply against the states. Some commentators suggest that a battle over incorporation stands between the Amendment and any right enforceable against state legislation. See, e.g., Gil Grantmore, The Phages of American Law, 36 U.C. Davis. L. Rev. 455, 474-75 (2003). The problem of exegesis posed by the First Amendment, "Congress shall make no law . . . ." is that somehow the prohibition against federal laws has to be extended to state laws. The Second Amendment says that "the right of the people . . . shall not be infringed," without limiting this protection of "the people's" right to protection against the federal government, so there is no verbal barrier to incorporation as there was with the First Amendment. Since it is plain that the First and Fourth amendments, also protecting rights of "the people," are incorporated against the states, it is hard to discern any sound reason why the right of "the people" in the Second Amendment would not be similarly incorporated.

There is also a collective aspect to "the people," but hardly the government-run collective contemplated by the panel. "We the People," when we "ordain and establish this Constitution," [47] act through convention, and then ratification in each state through conventions of delegates chosen in each state by the people. The act of "the people" in this sense was revolutionary, replacing an old regime, the Articles of Confederation, with a new one. And a core value protected by the Second Amendment for "the people" was "the Right of the people to alter or abolish"[48] tyrannical government, as they had done a decade before. The concept had been established by law in England as well, after its revolution from 1640 to 1660. In 1765, Blackstone explained the right of every Englishman "of having arms for their defence" arose from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[49]

As Blackstone describes the "natural right" of an Englishman to keep and bear arms, the arms are for personal defense as well as resistance to tyranny. The two are not always separable. After the Civil War, southern states began passing "Black Codes," designed to limit the freedom of blacks as much as possible.[50] The "Black Codes" often contained restrictions on firearm ownership and possession.[51] The codes sometimes made it a crime for whites even to loan guns to blacks.[52] A substantial part of the

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47 U.S. Const. pream.

48 The Declaration of Independence para. 2 (U.S. 1776).

49 1 William Blackstone, Commentaries on the Laws of England 139 (Legal Classics Library 1983) (1765).

50 Robert J. Cottrol and Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309, 344 (1991).

51 Id. at 345.

52 Id. at 345 n.178.

debate in Congress on the Fourteenth Amendment was its necessity to enable blacks to protect themselves from White terrorism and tyranny in the South.[53] Private terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such groups could only be realistically resisted with private firearms. When the state itself abets organized terrorism, the right of the people to keep and bear arms against a tyrant becomes inseparable from the right to self-defense.

III.

The Second Amendment begins with the clause "A well-regulated Militia, being necessary to the security of a free State . . . ."[54] Like the words "keep," "bear," and "the people," this prefatory language requires a construction that accords it independent meaning. As we shall see, far from limiting the right of the people to keep and bear arms to their active military service in some state-run unit, the prefatory language compels an interpretation that protects the right of people as individuals to keep and bear arms.

Much of the panel opinion addresses the meaning of the term "militia," yet the panel fails to acknowledge the controlling authorities that establish the meaning. The word "militia" is a term of art, and does not mean in the Constitution and laws of the United States what it means in some popular and journalistic usage — a group of ultra-right wing individuals who arm themselves as a paramilitary force. The panel defines

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[53] Stephen P. Halbrook, That Every Man Be Armed 110-15 (2d ed. 1994). Chief Justice Taney, in contrast, had earlier led the Supreme Court to deny citizenship to blacks precisely because it was so unthinkable they should have the full rights of citizenship — including the right "to keep and carry arms wherever they went." Dred Scott v. Sandford, 60 U.S. 393, 417 (1857).

[54] U.S. Const. amend. II.

militia as "the permanent state militia, not some amorphous body of the people as a whole."[55] But the law establishes with the utmost clarity that the militia is precisely what the panel says it is not, an "amorphous body of the people as a whole."

The United States Supreme Court's decision in *United States v. Miller*[56] establishes the definition of "militia" in the Second Amendment, a definition we, as an inferior court, must apply. *Miller* holds that "[t]he signification attached to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' "[57] As no intervening Supreme Court decision has altered this holding, we must proceed on the basis that a militia is a body of citizens, comprised at least of all males physically capable of acting in concert for the common defense. We shall see that "enrolled," for purposes of militia service, means something more like being registered for the draft, listed in the computer rolls for potential jury service, or enrolled by social security number for payment of taxes, than showing up at an armory for signup and training. The panel offers no explanation (and none could suffice) for failing to follow *Miller*'s definition.

The Second Amendment was ratified in 1791. The next year, Congress enacted the Militia Act,[58] implementing the Amendment and incorporating the general understanding of the time as to what the word meant, and establishing that the militia was indeed what the panel says it was not — an "amorphous body

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55 Silveira, 312 F.3d at 1072.

56 United States v. Miller, 307 U.S. 174 (1939).

57 Id. at 179.

58 Militia Act, 1 Stat. 271 (1792).

of the people as a whole."[59] The Militia Act of 1792 defined the "militia" as: "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years."[60] Thus, contrary to the "collective rights" notion in the panel opinion, the militia was precisely *not* "a state entity, a state fighting force,"[61] limited to those who are active members of such a collective organization. It was *all* the able-bodied white male citizens from 18 to 45, whether they were organized into a state fighting force or not.

In the appendix, I have reproduced the full text of this act of the Second Congress of the United States, and the text of section one appears in the footnote. It is worth noting a few additional aspects of the act. First, "each and every" "free able-bodied white male citizen" between 18 and 45 is in the militia. Second, each such person "shall" be enrolled by the commanding officer and notified of his enrollment, whether he wants to be enrolled or not.[62] Most importantly, third, the act

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[59] That contemporaneous Congressional enactments should inform our interpretation of the Bill of Rights is well established. See Marsh v. Chambers, 463 U.S. 783, 788-92 (1983) (in discussing the constitutionality of opening legislative sessions with a prayer, "It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

[60] Id.

[61] Silveira, 312 F.3d at 1070.

[62] CHAP. XXXIII.— An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States. (a)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each and every free able-bodied white male

required this "amorphous body of the people as a whole" to arm themselves, as opposed to the historical notion concocted by the panel that the Second Amendment merely "preserved the *right of the states* to

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citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this act. And it shall at all times hereafter be the duty of every such captain or commanding officer of a company to enrol every such citizen, as aforesaid, and also those who shall, from time to time, arrive at the age of eighteen years, or being of the age of eighteen years and under the age of forty-five years (except as before excepted) shall come to reside within his bounds; and shall without delay notify such citizen of the said enrolment, by a proper noncommissioned officer of the company, by whom such notice may be proved. That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack. That the commissioned officers shall severally be armed with a sword or hanger and espontoon, and that from and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

arm their militias."[63] The key language of this enactment, contemporaneous with the Second Amendment, is that "every citizen so enrolled and notified shall, within six months thereafter, *provide himself* with a good musket or firelock . . . or with a good rifle."[64] Each militiaman also, by federal law, had to "*provide himself*" with a bayonet, two spare flints, at least 24 cartridges if he brought a musket or firelock, or 20 balls (bullets) if he brought a rifle, and all sorts of other shooting equipment denoted in the finest detail by the statute.[65] The weapons, ammunition and accessories were, by federal statute, "exempted" from all suits and execution "for debt or for the payment of taxes."[66] Thus militiamen were entitled to keep their weapons even if a creditor could take the rest of their property, and even if that creditor was the government (for unpaid taxes).

An incidental benefit from reading this contemporaneous implementing statute is that it makes perfectly obvious what "well regulated" meant at the time the Second Amendment was adopted. The panel seems to imagine that a well regulated militia is a people disarmed until the government puts guns in their hands after summoning them to service. But the contemporaneous statute shows that a well regulated

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63 Silveira, 312 F.3d at 1087 (emphasis added).

64 1 Stat. 271 (1792) (emphasis added).

A musket is a shoulder gun, not necessarily rifled, named as guns used to be after a small bird of prey. A firelock is a flintlock, igniting the powder by flint and steel much as a Zippo ignites lighter fluid; a rifle is a shoulder gun with grooves in the barrel to make the bullet spin like a football as it flies. See 5 Oxford English Dictionary 950 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (firelock); 10 Oxford English Dictionary 132 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (musket); and see generally John Olson, The Book of the Rifle, 7-9 (1974); NRA Firearms Fact Book 33-35 (3d ed. 1989).

65 1 Stat. 271 (1792) (emphasis added).

66 Id.

militia is just the opposite, a people who have armed themselves at least to minimal national standards, and whom the militia officers inspect to assure that they have not wandered in off the streets without guns.[67] The "regulat[ion]" contemplated was not to disarm people when they were not at militia exercises, but rather to make sure they were armed, with their own guns. This was consistent with the colonial pattern of laws that typically "required colonists to carry weapons."[68] Among the acts of the crown seen as oppressions to be prevented from ever happening again were the Militia Acts of 1757 through 1763 authorizing British officials "to seize and remove the arms" of colonial militias when they thought it necessary to the peace of the kingdom.[69] The American Revolution was triggered when General Gage ordered troops to march from Boston to Lexington and Concord to do just that.[70] "[T]he Framers very arguably rejected as basic a Weberian notion as the state's monopoly on legitimate violence . . . . [T]he Framers weren't late-twentieth-century Americans

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[67] The notion of regulation requiring rather than prohibiting civilians to carry guns is not so antique as this reference may be taken to imply. The previously silent Alaska statutes were amended in 1949 to require flyers of small planes to carry emergency equipment including "one pistol, revolver, shotgun, or rifle, and ammunition for the same" much as the colonial statutes did, in order to enable the pilot to protect against bears if the plane went down before completing its flight. This requirement was deleted from the statute in 2001. See Alaska Stat. § 02.35.110 (current version); ACLA § 32-6-13 (1949), amended by § 2 ch 128 SLA 1949 (adding provision requiring firearms); and § 10 ch 56 SLA 2001 (deleting that provision).

[68] See Joyce Lee Malcom, To Keep and Bear Arms 139 (Harvard 1994).

[69] Id. at 144.

[70] Id. at 145.

(much less late-twentieth-century Europeans) . . . . "[71] They were the heirs of two revolutions, the English and the American, with an altogether different worldview.

The federal militia act promulgated immediately after the Second Amendment was ratified assured that no state could lighten the burden of its militia-eligible citizens, perhaps by requiring of them only a dozen rounds of ammunition instead of two dozen. And the militia officers had to check to make sure all the able-bodied white male citizens showed up when summoned, as a jury clerk does. Beyond that, they had to conduct inspections to make sure everyone had the firearms, bullets, bayonets, two spare flints, quarter pound of powder, ammunition pouch, and all the accessories the statute required of them.[72] These were the national regulations of the "well regulated militia."

The interpretation the panel gives to the phrase "well regulated" makes no more sense than the interpretation it gives to "militia." The panel relies on a single law review article for the proposition that the purpose of a "well regulated Militia" is inconsistent with an individual right to own weapons.[73] The law review article simply presents the author's opinion, as an *ipse dixit*, that "[The Second Amendment] does not apply to the 'unorganized' militia, because that militia is certainly not 'well regulated' . . . The majority in the First Congress intended to reassure the Anti-

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[71] Glenn Harlan Reynolds, The Second Amendment as a Window on the Framer's Worldview, in Eugene Volokh, Robert J. Cottrol, Sanford Levinson, L.A. Powe, Jr., & Glenn Harlan Reynolds, The Second Amendment as Teaching Tool in Constitutional Law Classes, 48 J. Legal Educ. 591, 598 (1998).

[72] 1 Stat. 271 (1792).

[73] Silveira, 312 F.3d at 1072 (citing Paul Finkelman, "A Well Regulated Militia": The Second Amendment in Historical Perspective, 76 Chi.-Kent L. Rev. 195, 234 (2000)).

federalists that the national government would not disarm those who are trained by the state militia and in that body — the 'well regulated Militia.' "[74] One reason this makes no sense is that the Second Congress, consisting of many of the same personnel as the first, described precisely what sort of regulation they had in mind for a "well regulated" militia, and far from requiring that anyone with a gun be trained and supervised, they required that all the untrained and unsupervised white male citizens between 18 and 45 acquire and maintain guns and ammunition. Another reason is that, as the panel concedes, the Second Amendment was written in part to avoid the necessity of standing armies, and protect the citizenry against standing armies, precisely the opposite of requiring that only members of formally organized standing collective government organizations have guns.

Were the modern federal statute to narrow the meaning of "militia" to something like the organized national guard that the panel envisions, then the statutory meaning of the term would differ from the meaning in the Second Amendment, and we would be bound, for Constitutional purposes, by the broader definition established by *Miller*. It would be as though Congress defined "press" for purposes of issuing press passes to a reserved section of the Capitol building to mean something narrower than "press" for purposes of the "freedom . . . of the press" protected by the First Amendment. The new, narrower statutory meaning would not limit the Constitutional freedom.

We need not parse this problem, though, because Congress has broadened rather than narrowed the term. Today the United States Code still defines the term "militia."[75] The modern statute, instead of

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[74] Finkelman, 76 Chi.-Kent L. Rev. at 234.

[75] 10 U.S.C. § 311. Militia: composition and classes

The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or

narrowing the militia to an organized body of regularly supervised and trained part time soldiers, *broadens* the term. The statute specifies that the "militia" consists not only of the "organized" militia, consisting of the National Guard and the Naval Militia, but also an "unorganized militia." The "unorganized militia" is precisely what the panel says it is not, "an amorphous body of the people as a whole." Now, instead of being limited to white male citizens between 18 and 45, the militia has (of course) no racial restriction. Non-citizens are now included, provided they have declared an intention to become citizens. The sex restriction is gone and females are included if they are members of the National Guard. People become part of the militia now at age 17 instead of 18. The only narrowing of the statutory scope is that we are no longer required by law to own and furnish guns, ammunition and bayonets. So now the militia consists not only of all white male citizens between 18 and 45, but also all able-bodied non-white males, whether citizens or non-citizens declared for citizenship, between 17 and 45, and all females in the National Guard. Those of us who are male and able-bodied have almost all been militiamen for most of our lives whether we know it or not, whether we were organized or not, whether our state governments supervised our possession and use of arms or not.

Thus, as used in law, the meaning of the word has not changed significantly, other than to grow more inclusive. It is, and always has been, emphatically the

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who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

The classes of the militia are—

the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval

case that militia members do not have to be "organized" in a "collective" state service, because the statute provides expressly for the existence of the "unorganized" militia. Members of the National Guard are in the "organized militia," and those not in the National Guard are also in the "unorganized militia." Various classes of persons are exempt from militia service, most notably the "organized fighting force," as the panel would put it, who are active "[m]embers of the armed forces." Thus, soldiers, as we now use the term, are generally *not* in the militia, and the rest of us *are*. Far from being an organized collectivity functioning as a fighting force, the militia is like the jury pool, consisting of "the people," limited, like the jury pool, to those capable of performing the service for which militias or jury pools are established. The militia is indeed "the people," as individuals and not as an organized collective body, and the Second Amendment expressly prohibits government from disarming the people.

IV.

The next analytic task is to determine how the prefatory or purpose clause of the Second Amendment, "A well-regulated Militia, being necessary to the security of a free State," bears on the meaning of "the right of the people to keep and bear Arms." The panel's interpretation that the Second Amendment protects only the right of the states to arm their militias is syntactically impossible, because the language expressly provides that the right belongs to "the people" rather than the states or the militias. Treating the right the Second Amendment assigns to "the people" as a power of the militia is even less defensible than it would be to limit the Congressional power to grant copyrights only to those writings that actually do "promote the Progress of Science and useful Arts,"[76] rendering *The Wizard of Oz* and

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76 U.S. Const. art. I.

Steamboat Willie uncopyrightable. The task of providing a sounder interpretation is assisted by consideration of the historical context of the Second Amendment, the analytic approach used by the Supreme Court in *United States v. Miller*, and the practical consequences for militia service of an armed, or disarmed, populace.

The historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms. When the Amendment was adopted, the drafters doubtless turned to provisions in many of the state constitutions as models.[77] These provisions themselves had models, in the tradition of common-law lawyers copying older forms. Like many of our individual liberties, the right to keep and bear arms was cemented into English law in the aftermath of the English Revolution, a little over a century before the Second Amendment was drafted. And like many provisions of the federal Constitution, the Second Amendment had state constitutional models, among which justificatory preambles were common.[78]

The history that led to the drafting of the Second Amendment evolved for centuries in England, leading to its immediate predecessor in the English Declaration of Rights. A 1328 statute provided for forfeiture of arms and imprisonment if they were improperly used or carried.[79] A 1686 case construing that statute held that its purpose was "to punish people who go armed to terrify the King's subjects,"[80]

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[77] Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U. L. Rev. 793, 814 et seq. (1998).

[78] Id. at 794 et seq.

[79] Statute of Northampton, 2 Edw. 3, c. 3 (1328) (quoted in 5 The Founders' Constitution 209 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

[80] Sir John Knight's Case, 87 Eng. Rep. 75 (K.B. 1686) (quoted in 5 The Founders' Constitution 209 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

apparently limiting the statute. Of course the King's subjects decided to quit being subjects in the English revolution, from 1640 to 1660, and seized for commoners rights that had previously been limited. After the Restoration, following a long series of grievances against James II, Parliament declared in 1689 that the English throne was "vacant."[81] In response to these grievances, and prior to offering the throne to William of Orange and Mary, parliament drafted the Declaration of Rights. In the debates leading up to the passage of the Declaration of Rights, members of parliament complained of Charles II's and James II's attempts to disarm their subjects.[82] Parliament conditioned William's and Mary's accession upon their acceptance of the Declaration of Rights (or Bill of Rights as it is usually termed) of 1689.

The English Bill of Rights, a century before ours, provided "That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law."[83] Since England had no states, obviously this right of "subjects" was a right of individuals, not of states. William Blackstone, who wrote his *Commentaries* roughly 75 years after the Declaration of Rights, provided the standard reference work for Colonial and early American lawyers. "[His] works constituted the preeminent authority on English law for the founding generation,"[84] and he was "the Framers' accepted authority on English law and the English Constitution."[85] Because Blackstone covered the

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81 Joyce Lee Malcom, To Keep and Bear Arms 113 (Harvard 1994).

82 Id. at 115.

83 1 W. & M., 2d sess., c, 2, Dec. 16, 1689 (quoted in 5 The Founders' Constitution 210 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

84 Alden v. Maine, 527 U.S. 706, 715 (1999).

85 Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, Souter, & Ginsburg, JJ., concurring in part and dissenting in part).

whole of the common law in only four easily read, highly portable, well indexed volumes, it is easy to see why our Founders found his treatise so useful, and copied from it as much as they did. Blackstone explains that the right of "having" arms is among the five basic rights of every Englishman, those rights which serve to secure the "primary rights."[86] The right to have arms is a natural right, in Blackstone's view, because it arises from the natural right of self preservation, and the right (as an Englishman writing only a century after the English Revolution would be mindful of) of "resistance . . . to the violence of oppression." Blackstone wrote: "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c.2 [the provision of the English Bill of Rights quoted above] and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[87] Though Blackstone refers to the right of resistance against oppression, his reasoning in the preceding pages is based more on the idea that life and limb are a gift of God, that natural liberty consists of "the right of personal security, the right of personal liberty, and the right of private property,"[88] and that the high value of life is what pardons homicide if in self defense.[89]

The English Bill of Rights and the Constitution's predecessor state constitutions based on it protected a private and individual right to bear arms both for self

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[86] 1 William Blackstone, Commentaries on the Laws of England 136, 139 (Legal Classics Library 1983) (1765).

[87] Id. at 139.

[88] Id. at 125.

[89] Id. at 126.

defense and for defense against oppression, as Blackstone explained. The Second Amendment was not novel, but rather codified and expanded upon long established principles. These principles protected individual, not collective, rights to keep and bear arms. And it was so understood. William Rawle's *A View of the Constitution*, published in 1829, explained "The prohibition [in the Second Amendment] is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both."[90] Likewise, Justice Joseph Story wrote that "The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."[91]

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[90] William Rawle, A View of the Constitution of the United States, 125-26 (2d. ed 1829) (quoted in 5 The Founders' Constitution 214 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

[91] 3 Joseph Story, Commentaries on the Constitution § 1890 (1833) (quoted in 5 The Founders' Constitution 214

Judge Thomas Cooley, in his *The General Principles of Constitutional Law* wrote "It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."[92] Both Judge Cooley and Justice Story are, of course, expressly cited as "important" commentators by the Supreme Court's opinion in *Miller*.[93]

As Justice Thomas has written, "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right."[94] The embarrassed attitude of many

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(Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

92 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 281-82 (2d ed. 1891) (quoted in David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. Rev. 1359, 1465 (1998)).

93 United States v. Miller, 307 U.S. 174, 182 n.3 (1939).

94 Printz v. United States, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The

of the honest scholars who have so concluded, contrary to their own policy preferences, is well stated by the title of one of the seminal articles, "The Embarrassing Second Amendment." The texts and treatises appear generally to be moving to the view expressed in this opinion.[95]

V.

What we have, in the Second Amendment, is a prohibition against government infringement of an individual right to keep and bear arms, consistent with what had long been understood to be a natural right guaranteed by the English Bill of Rights to Englishmen. The militia clause expanded the protection from the English Bill of Rights to emphasize the importance of a check and balance on standing armies in addition to the traditional English right to possess arms for purposes of self-defense. Like any right, it is not absolute. Just as the right to freedom of speech is subject to limitations for defamation, threats, conspiracy, and all sorts of other traditional qualifications, so is the right to keep and bear arms. Indeed, the word "infringed" in the Second Amendment suggests that the right, such as it is, may not be "encroached upon,"[96] rather than that it, unlike

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Second Amendment and the Personal Right to Arms, 43 Duke L.J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L.J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983)).

[95] See, e.g., 1 Laurence H. Tribe, American Constitutional Law 902 n.211 (3d. ed. 2000) (recognizing a "right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in the defense of themselves and their homes 8 .") and Akhil Reed Amar, The Bill of Rights 46-63 (1998) (adopting individual rights view).

[96] The American Heritage Dictionary 661 (2d ed. 1982).

all the other rights in the Bill of Rights, is absolute. The one thing that is absolute is that the Second Amendment guarantees a personal and individual right to keep and bear arms, and prohibits government from disarming the people.

The Supreme Court's decision in *United States v. Miller*[97] establishes the method by which we must apply the Amendment's opening clause, "A well regulated militia, being necessary to the security of a free state." In *Miller*, two defendants tried to get an indictment for possessing a sawed off shotgun dismissed on the basis of the Second Amendment right to keep and bear arms. The district court granted their motion. The Supreme Court reversed and remanded. *Miller* teaches that the Amendment has the "obvious purpose to assure the continuation and render possible the effectiveness"[98] of state militias who would be "civilians primarily, soldiers on occasion,"[99] because of the wariness at the time toward standing armies. The term "militia," *Miller* holds, was intended in the Second Amendment to denote substantially "all males physically capable of acting in concert for the common defense."[100] Far from being armed by the state governments as they found desirable, as the panel says,[101] *Miller* holds that "these men were expected to appear bearing arms supplied by themselves."[102] *Miller* cites Blackstone, Adam Smith, and colonial history sources, explaining the civilian aspect of militias, as opposed to standing armies, and that the militia system implied not just a right, but "the general obligation of all adult male

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97 307 U.S. 174 (1939).

98 Id. at 178.

99 Id. at 179.

100 Id.

101 Silveira, 312 F.3d at 1087.

102 307 U.S. at 179.

inhabitants to possess arms,"[103] to assist as needed in defense, and to furnish ammunition, subject to fines if they did *not* possess arms.[104] Many of the colonies' laws, quoted extensively in *Miller*, established minimum standards to assure that the weapons were adequate, such as that a musket had to be at least 3'9" long. Much as building codes today require smoke detectors in the home, a man had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bullets, to be produced when called for by a militia officer.[105]

Thus *Miller* cemented in, rather than reading out, the interpretation of the Second Amendment that I have followed. The Amendment reflected the Founders' hostility to standing armies, and had as its purpose assuring the effectiveness of a civilian non-standing militia consisting of most of the able-bodied male population, who were expected and often required to own their own guns. The reason that the defendants (who did not appear on appeal[106]) lost their case was that "*In the absence of any evidence* tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. Certainly it is *not within judicial notice* that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[107]

What is striking about the reversal in *Miller* is the great care the court took to limit its holding. *Miller* did

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[103] Id. (quoting 1 Osgood, The American Colonies in the 17th Century).

[104] Id. at 180.

[105] Id. at 180-81.

[106] Stephen P. Halbrook, That Every Man Be Armed 165 (2d ed. 1994).

[107] Miller, 307 U.S. at 178 (emphasis added).

not adopt the "collective rights" notion that only state governments as supervisors of the militia could possess arms, though the government had urged that interpretation on the Court in its brief.[108] *Miller* rejected the notion of a sawed-off shotgun as a militia weapon. It did not reject the right of individuals to possess arms. And *Miller* qualified even the rejection of sawed-off shotguns, by limiting the holding to a case where there was no evidence, and judicial notice could not be taken, of any "reasonable relationship" of sawed-off shotguns to militia use. Had the Court been of the view that the Second Amendment protected only the powers of the states to arm their militias, it would have accepted that argument from the government's brief, and never would have reached the issue of the relationship of sawed off shotguns to militias.

What private possession of arms does carry a "reasonable relationship to the preservation or efficiency of a well-regulated militia?" This is the question we must ask because this is the Second Amendment test *Miller* construes from the introductory clause of the Amendment. At the time the Amendment was drafted, when states were likely to have inadequate revenues to arm their militias, it was necessary that those who might be useful arm themselves with military type weapons. That is probably less relevant today, though times can always change. But the issue of furnishing arms for combat is not the only one involved in militia effectiveness. An effective militia requires not only that people have guns, but that they be able to shoot them with more danger to their adversaries than themselves. Standing next to a nineteen year old who for the first time has a loaded gun in his hands is like taking a fifteen or sixteen year old for his first driving lesson. And if no one knew how to shoot except designated shooters, a military supply unit of new recruits would be as

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[108] United States v. Emerson, 270 F.3d 203, 223 (5th Cir. 2001).

helpless as if no one knew how to drive except designated drivers. Just as military mobility is enhanced by near-universal civilian knowledge of how to drive, likewise military effectiveness is promoted by widespread civilian shooting skills (and, we shall see, Congress has so decided and provided for civilian firearms training).

An effective militia undoubtedly requires that a considerable portion of the members enter it with some familiarity with gun safety and use. Beginning in 1916, Congress provided for the army to promote "practice in the use of rifled arms" by giving free weapons and ammunition to "youth-oriented organizations" and selling army surplus weapons to adults, in an army-assisted "Civilian Marksmanship Program."[109] In 1996, Congress created an independent federal corporation, the first board of directors to be appointed by the Secretary of the Army, to carry on the same program,[110] which is in effect today, for "instruction of citizens of the United States in marksmanship."[111] Congress directed that the corporation "give priority to activities that benefit firearms safety, training, and competition for youth and that reach as many youth participants as possible."[112] Thus, regardless of what policy preferences others might have, the policy Congress has adopted (and re-adopted in 1996) is to provide for a well regulated militia by putting guns in young people's hands and teaching them how to handle them safely and how to shoot them.

Though the stated justification and purpose of the Amendment relates to the militia, the language is carefully drafted to avoid abridging the traditional English Bill of Rights entitlement of individuals to

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[109] 10 U.S.C. § 4308 (1995).

[110] 36 U.S.C. § 5501 (1996) (current version at 36 U.S.C. §§ 40701-02).

[111] 36 U.S.C. § 5502 (1996), recodified at 36 U.S.C. § 40722.

[112] 36 U.S.C. § 5502 (1996) recodified at 36 U.S.C. § 40724.

possess arms for self defense. It would have, of course, been highly unlikely that the American Revolutionaries a few years later would have wanted to deprive Americans of rights they had always had as Englishmen. They protected this traditional right by attaching the "right . . . to keep and bear Arms" to "the people," rather than establishing it as a "power" of the states. The English right was retained, and expanded.

Like most serious discussions of the Second Amendment, this dissent focuses heavily on history. Though general history, like legislative history, cannot be used to supplant the words of the law, it informs us of what social problem the writers of the law intended to address.[113] The problem the Founders sought to avoid was a disarmed populace. At the margins, the Second Amendment can be read various ways in various cases, but there is no way this Amendment, designed to assure an armed population, can be read to allow government to disarm the population.

VI.

Constitutional interpretation cannot properly be based on whatever policy judgments we might make about the desirability of an armed populace, or the relevance of the Amendment's concern with citizen militias to modern times. Those who think the Second Amendment is a troublesome antique inappropriate to modern times can repeal it, as provided in Article V. That has been done before, as with legislative selection of Senators, and with Prohibition. There is a serious argument for its continued relevance, from those who think that the natural right to self defense, protected by the English Bill of Rights as well as the Second Amendment, is still important as a matter of policy. A police force in a free state cannot provide everyone with bodyguards. Indeed, while some think guns cause violent crime, others think that widespread

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[113] See Portland 76/Auto Truck Plaza v. Union Oil, 153 F.3d 938, 944 (9th Cir. 1998).

possession of guns on balance reduces violent crime.[114] None of these policy arguments on either side affects what the Second Amendment says, that our Constitution protects "the right of the people to keep and bear Arms."

Neither can judges' policy concerns affect our duty as a court. Congress and the states may enact reasonable restrictions to manage the ways in which the populace exercises its right to keep and bear arms, just as reasonable restrictions are imposed on our rights to free speech, free assembly, freedom from search and seizure, and all our other constitutional rights. What the Second Amendment prohibits is not reasonable regulation consistent with its purposes, but disarmament of the people. Where the Constitution establishes a right of the people, no organ of the government, including the courts, can legitimately take that right away from the people. All of our rights, every one of them, may become impediments to the efficient functioning of our government and our society from time to time, but fortunately they are locked in by the Constitution against permanent loss because of temporary impediments. The courts should enforce our individual rights guaranteed by our Constitution, not erase them.

GOULD, Circuit Judge, with whom Circuit Judge **KOZINSKI** joins, dissenting from denial of rehearing en banc:

The error of *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), is repeated once again, thus I respectfully dissent from denial of rehearing en banc for the reasons stated in my concurring opinion in *Nordyke v. King*, 319 F.3d 1185, 1192-98 (9th Cir. 2003) (Gould, J., specially concurring). As I there explained, restricting the Second Amendment to a "collective

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[114] See, e.g., John Lott, More Guns, Less Crime (1998).

rights" view and ignoring the individual right of the people to keep and bear arms is inconsistent with the Second Amendment's language, structure, and purposes, and weakens our Nation against recurrent internal and external threats that may undermine individual liberty. *See also United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

DECISION OF US COURT OF APPEALS
***SILVEIRA* v. *LOCKYER*,**
312 F.3d 1052 (9TH Cir. Dec. 5, 2002,
amended Jan. 27, 2003)
http://caselaw.lp.findlaw.com/data2/circs/9th/0115098ap.pdf

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

SEAN SILVEIRA, et al, *Plaintiffs-Appellants*,
v.
BILL LOCKYER, Attorney General; GRAY DAVIS, Governor, State of California, *Defendants-Appellees*.

Appeal from the United States District Court
Eastern District of California
William B. Shubb, District Judge, Presiding
Argued and Submitted
February 15, 2002—San Francisco, California
FILED DECEMBER 5, 2002
Before: Stephen Reinhardt, Frank J. Magill,* and Raymond C. Fisher, Circuit Judges.
Opinion by Judge Reinhardt;
Concurrence by Judge Magill

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*The Honorable Frank J. Magill, Senior Circuit Judge, Eighth Circuit, sitting by designation.

COUNSEL

Gary W. Gorski, Fair Oaks, California, for appellants.

Nancy Palmieri, Deputy Attorney General, Office of the Attorney General, San Diego, California, for the appellees.

ORDER

The majority opinion filed Dec. 5, 2002, is hereby amended as follows:

1 At Slip Op. at 7, footnote 1, replace "*See* Michael A. Bellesiles, *Gun Control: A Historical Overview*, 28 CRIME & JUST. 137, 174-76 (2001) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72)), as a reaction to the use of machine guns by mobsters and the depiction of such violence in films such as *Scarface*)."

with

"*See* EARL R. KRUSCHKE, GUN CONTROL: A REFERENCE HANDBOOK 84, 170 (1995) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72), as a reaction to the use of machine guns by mobsters and "organized crime elements")."

2. At Slip Op. at 44, footnote 37, delete "(quoted in Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 65 (2000))"

OPINION

REINHARDT, Circuit Judge:

In 1999, the State of California enacted amendments to its gun control laws that significantly strengthened the state's restrictions on the possession, use, and transfer of the semiautomatic weapons popularly known as "assault weapons." Plaintiffs, California residents who either own assault weapons, seek to acquire such weapons, or both, brought this challenge to the gun control statute, asserting that the law, as 5 SILVEIRA v. LOCKYER amended, violates the Second Amendment, the Equal Protection Clause, and a host of other constitutional

provisions. The district court dismissed all of the plaintiffs' claims. Because the Second Amendment does not confer an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision. As to the Equal Protection claims, we conclude that there is no constitutional infirmity in the statute's provisions regarding active peace officers. We find, however, no rational basis for the establishment of a statutory exception with respect to retired peace officers, and hold that the retired officers' exception fails even the most deferential level of scrutiny under the Equal Protection Clause. Finally, we conclude that each of the three additional constitutional claims asserted by plaintiffs on appeal is without merit.

I. INTRODUCTION

In response to a proliferation of shootings involving semiautomatic weapons, the California Legislature passed the Roberti-Roos Assault Weapons Control Act ("the AWCA") in 1989. *See* 1989 Cal. Stat. ch. 19, § 3, at 64, codified at CAL. PENAL CODE § 12275 *et seq.* The immediate cause of the AWCA's enactment was a random shooting earlier that year at the Cleveland - Elementary School in Stockton, California. An individual armed with an AK-47 semi-automatic weapon opened fire on the schoolyard, where three hundred pupils were enjoying their morning recess. Five children aged 6 to 9 were killed, and one teacher and 29 children were wounded. *Kasler v. Lockyer*, 2 P.3d 581, 587 (Cal. 2000).

The California Assembly met soon thereafter in an extraordinary session called for the purpose of enacting a response to the Stockton shooting. 1 CAL. ASSEMBLY J., at 436-37 (Feb. 13, 1989). The legislation that followed, the AWCA, was the first legislative restriction on assault weapons in the nation, and was the model for a similar federal statute enacted in 1994. Public Safety and Firearms Use Protection Act, Pub. L. 6 SILVEIRA v. LOCKYER No.

103-322, 108 Stat. 1996 (codified at 18 U.S.C. §§ 921 *et seq.*). The AWCA renders it a felony offense to manufacture in California any of the semi-automatic weapons specified in the statute, or to possess, sell, transfer, or import into the state such weapons without a permit. CAL. PENAL CODE § 12280.

[1] The statute contains a grandfather clause that permits the ownership of assault weapons by individuals who lawfully purchased them before the statute's enactment, so long as the owners register the weapons

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[1] Semiautomatic weapons differ from fully automatic machine guns in the following respects: Automatic weapons feed ammunition into the gun's chamber immediately after the firing of each bullet, so that the weapon will continue to reload and fire continuously so long as the trigger is depressed. Purchase and ownership of automatic weapons has been restricted by the federal government since the days of Al Capone and the machine gun violence associated with the Prohibition Era. *See* Michael A. Bellesiles, *Gun Control: A Historical Overview,* 28 CRIME & JUST. 137, 174-76 (2001) (discussing the enactment of the National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (current version codified as 26 U.S.C. §§ 5801-72)), as a reaction to the use of machine guns by mobsters and the depiction of such violence in films such as *Scarface*).

In contrast to automatic weapons, only one bullet is fired when the user of a semi-automatic weapon depresses the trigger, but another is automatically reloaded into the gun's chamber. 27 C.F.R. § 178.11 (defining semiautomatic weapons). Thus, by squeezing the trigger repeatedly and rapidly, the user can release many rounds of ammunition in a brief period of time — certainly many more than the user of a standard, manually-loaded weapon. Moreover, the semi-automatic weapons known as assault weapons contain large-capacity magazines, which require the user of the weapon to cease firing to reload relatively infrequently because the magazines contain so much ammunition. Consequently, users of such weapons can "spray-fire" multiple rounds of ammunition, with potentially devastating effects. Michael G. Lennett, *Taking A Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 609 (1995).

with the state Department of Justice. *Id.*[2] The grandfather clause, however, imposes significant restrictions on the use of weapons that are registered pursuant to its provisions. *Id.*§ 12285(c).[3] Approximately forty models of firearms are listed in the statute as subject to its restrictions.

The specified weapons include "civilian" models of military weapons that feature slightly less firepower than the military issue versions, such as the Uzi, an Israeli-made military rifle; the AR-15, a semi-automatic version of the United States military's standard-issue machine gun, the M-16; and the AK-47, a Russian-designed and Chinese-produced military rifle. The AWCA also includes a mechanism for the Attorney General to seek a judicial declaration in certain California Superior Courts that weapons identical to the listed firearms are also subject to the statutory restrictions. § 12276.5(a)(1)-(2).[4]

The AWCA includes a provision that codifies the legislative findings and expresses the legislature's reasons for passing the law:

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[2] An individual who lawfully obtained an assault weapon prior to the enactment of the AWCA may avoid the requirement of registering it with the state if he renders the weapon permanently inoperable, relinquishes it to a state law enforcement agency, sells it to a licensed California firearms dealer, or removes it from the State of California.

[3] A person who has registered an assault weapon may possess the weapon only at his own residence, his place of business, certain private and public clubs organized for the purpose of target shooting, certain firearms exhibitions approved by law enforcement agencies, or on specified public lands. § 12285(c)(1)-(6). Additionally, an assault weapon owner may transport his registered weapon to any of the above locations only so long as he complies with the methods of transportation prescribed in the statute. § 12285(7); § 12026.1.

[4] Unless otherwise noted, citations to statutory provisions in this opinion refer to the sections of the AWCA as codified in the California Penal Code.

The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in [the statute] based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities. *Id.* § 12275.5.

In 1999, the legislature amended the AWCA in order to broaden its coverage and to render it more flexible in response to technological developments in the manufacture of semiautomatic weapons. The amended AWCA retains both the original list of models of restricted weapons, and the judicial declaration procedure by which models may be added to the list. The 1999 amendments to the AWCA statute add a third method of defining the class of restricted weapons: The amendments provide that a weapon constitutes a restricted assault weapon if it possesses certain generic characteristics listed in the statute. *Id.* § 12276.1.[5] Examples of the types of weapons

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[5] The reason that the legislature defined the restricted assault weapons generically, by feature, is that after the enactment of the AWCA, gun manufacturers began to produce "copycat" weapons in order to evade the statute's restrictions. These weapons varied only slightly from the models listed in the act, but were different enough from those models that they evaded the law's restrictions. Martha L. Willman, *Davis Backs Bill to*

restricted by the revised AWCA include a "semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds," § 12276.1(a)(2), and a semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and also features a flash suppressor, a grenade launcher, or a flare launcher. § 12276.1(a)(1)(A)-(E). The amended AWCA also restricts assault weapons equipped with "barrel shrouds," which protect the user's hands from the intense heat created by the rapid firing of the weapon, as well as semiautomatic weapons equipped with silencers. *Id.*

As originally enacted, the AWCA authorized specified law enforcement agencies to purchase and possess assault weapons, and permitted individual sworn members of those agencies to possess and use the weapons in the course of their official duties.[6] Two additional provisions relating to peace officers were added by the 1999 amendments. First, the legislature provided that the peace officers permitted to possess and use assault weapons in the discharge of their official duties were permitted to do so "for law enforcement purposes, whether on or off duty." § 12280(g). Second, the amendments added an exception for retired peace officers. The exception provides that "the sale or transfer of assault weapons by an entity [listed in note 6, *supra*,] to a person, upon retirement, who retired as a sworn officer from that entity" is permissible, and that the general restrictions on possession and use of assault weapons do not apply to a retired peace officer who receives the weapon upon

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Limit Assault Gun Sale and Use Legislation, L.A. TIMES, Apr. 27, 1999, at B2.

[6] The specified agencies include the California Department of Justice, police departments, sheriffs' departments, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Game, and Department of Parks and Recreation. § 12280(f). Also included were members of the "military or naval forces of this state or of the United States." *Id.*

retirement from his official duties. § 12280(h)-(i). In sum, then, the statute as amended may fairly be characterized as constituting a ban on the possession of assault weapons by private individuals; with a grandfather clause permitting the retention of previously-owned weapons by their purchasers, provided the owners register them with the state; and with a statutory exception allowing the possession of assault weapons by retired peace officers who acquire them from their employers at the time of their retirement.

Plaintiffs in this case are nine individuals, some of whom lawfully acquired weapons that were subsequently classified as assault weapons under the amended AWCA.[7] They filed this action in February, 2000, one month after the 1999 AWCA amendments took effect. Plaintiffs who own assault weapons challenge the AWCA requirements that they either register, relinquish, or render inoperable their assault weapons as violative of their Second Amendment rights. Plaintiffs who seek to purchase weapons that may no longer lawfully be purchased in California also attack the ban on assault weapon sales as being contrary to their rights under that Amendment. Additionally, plaintiffs who are not active or retired California peace officers challenge on Fourteenth Amendment Equal Protection grounds two provisions of the AWCA: one that allows active peace officers to possess assault weapons while off-duty, and one that permits retired peace officers to possess assault weapons they acquire from their department at the time of their retirement. The State of California immediately moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that all the claims were barred as a matter of law. After a hearing, the district judge granted the defendants' motion in all respects, and

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[7] The nine plaintiffs include, *inter alia*, two California National Guardsmen (both combat veterans), a San Francisco police officer, an insurance agent, a chemical engineer, and a California correctional officer.

dismissed the case. Plaintiffs appeal, and we affirm on all claims but one.

II. DISCUSSION

A. Background and Precedent.

A robust constitutional debate is currently taking place in this nation regarding the scope of the Second Amendment, a debate that has gained intensity over the last several years. Until recently, this relatively obscure constitutional provision attracted little judicial or scholarly attention. As a result, however, of increasing popular concern over gun violence, the passage of legislation restricting the sale and use of firearms, the cultural significance of firearms in American society, and the political activities of pro-gun enthusiasts under the leadership of the National Rifle Association (the NRA), the disagreement over the meaning of the Second Amendment has grown particularly heated.

[1] There are three principal schools of thought that form the basis for the debate. The first, which we will refer to as the "traditional individual rights" model, holds that the Second Amendment guarantees to individual private citizens a fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulation. This view, urged by the NRA and other firearms enthusiasts, as well as by a prolific cadre of fervent supporters in the legal academy, had never been adopted by any court until the recent Fifth Circuit decision in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002). The second view, a variant of the first, we will refer to as the "limited individual rights" model. Under that view, individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service.[8] The third, a wholly

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[8] In the Fifth Circuit's decision in *Emerson*, that court describes a view of the amendment that it calls the "sophisticated collective rights model." 270 F.3d at 219. That view of the amendment holds that individual members of state militia may

contrary view, commonly called the "collective rights" model, asserts that the Second Amendment right to "bear arms" guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. Under this theory of the amendment, the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like. Long the dominant view of the Second Amendment, and widely accepted by the federal courts, the collective rights model has recently come under strong criticism from individual rights advocates. After conducting a full analysis of the amendment, its history, and its purpose, we reaffirm our conclusion in *Hickman v. Block*, 81 F.3d 98 (9th Cir. 1996), that it is this collective rights model which provides the best interpretation of the Second Amendment.

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personally use and possess firearms, but only to the extent that they do so as part of their active military service. *Id.* We conclude that a more plausible theory is that which we describe as the "limited individual right" model. Of course, one could posit a series of variations on the Second Amendment theme, including a number of potential approaches differing only in degree from each other. The Fifth Circuit's "sophisticated collective rights model," however, appears to be a strawman that can all too readily be disposed of, as the Fifth Circuit does with relatively little difficulty. Ultimately, the Fifth Circuit adopts a weapons-based theory of the amendment that permits individuals to possess firearms for personal use, regardless of the relationship of the individual or the weapon to militia service, as long as those weapons have a "legitimate use in the hands of private individuals." *Emerson*, 270 F.3d at 223 (quoting the government's brief in *United States v. Miller*, 307 U.S. 174 (1939)). We conclude, respectfully, that the Fifth Circuit's theory is contrary not only to *Miller* but to the basic purpose and effect of the Second Amendment.

Despite the increased attention by commentators and political interest groups to the question of what exactly the Second Amendment protects, with the sole exception of the Fifth Circuit's *Emerson* decision there exists no thorough judicial examination of the amendment's meaning. The Supreme Court's most extensive treatment of the amendment is a somewhat cryptic discussion in *United States v. Miller*, 307 U.S. 174 (1939). In that case, a criminal defendant brought a Second Amendment challenge to a federal gun control law that prohibited the transport of sawed-off shotguns in interstate commerce. The Court rejected the challenge to the statute. In the only and oft-quoted passage in the United States Reports to consider, albeit somewhat indirectly, whether the Second Amendment establishes an individual right to arms, the *Miller* Court concluded:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the reservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Miller, 307 U.S. at 178. The *Miller* Court also observed more generally that "[w]ith the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* Thus, in *Miller* the Supreme Court decided that because a weapon was not suitable for use in the militia, its possession was not protected by the Second Amendment. As a result of its phrasing of its holding in the negative, however, the *Miller* Court's opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment

does protect. Accordingly, it has been noted, with good reason, that "[t]he Supreme Court's jurisprudence on the scope of [the Second] [A]mendment is quite limited, and not entirely illuminating." *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999). What *Miller* does strongly imply, however, is that the Supreme Court rejects the traditional individual rights view.

The only *post-Miller* reference by the Supreme Court to the scope of the amendment occurred in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980), in which the Court noted, in a footnote dismissing a Second Amendment challenge to a felon-in-possession conviction, that the federal gun control laws at issue did not "trench upon any constitutionally protected liberties," citing *Miller* in support of this observation. In that footnote, *Lewis* characterized the *Miller* holding as follows:

"[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia.' " *Id.* (quoting *Miller*, 307 U.S. at 178). The *Lewis* Court, like the *Miller* Court, phrased its statements in terms of what is *not* protected. *Lewis* does, however, reinforce the strong implication in *Miller* that the Court rejects the traditional individual rights model.

Some thirty-odd years after *Miller*, two Justices of the Court pithily expressed their views on the question whether the Second Amendment limits the power of the federal or state governments to enact gun control laws. Justice Douglas, joined by Justice Thurgood Marshall, stated in dissent in *Adams v. Williams*, that in his view, the problem of police fearing that suspects they apprehend are armed:

> is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment . . . . There is under our decisions no reason why stiff state laws governing

> the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

407 U.S. 143, 150 (1972) (Douglas, J., dissenting). In short, in *Adams* two then-sitting Justices made it clear that they believed that the Second Amendment did not afford an individual right — traditional, limited, or otherwise — to own or possess guns.

We also note that two of the Supreme Court's recent decisions that limit the power of the federal government to regulate activities of the states relate to firearms restrictions. *See Printz v. United States*, 521 U.S. 898 (1997) (holding that a federal requirement that state officers perform background checks on gun purchasers violates the anti-commandeering principle of the Tenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress exceeded its authority under the Commerce Clause by enacting the Gun-Free School Zones Act). In neither case did the Court address a Second Amendment issue directly; however, in each case a currently-sitting Justice expressed his individual view of the amendment's scope, directly or indirectly, but from radically different standpoints. In his dissent in *Lopez*, Justice Stevens, although not mentioning the Second Amendment, strongly implied that he believes that it offers no obstacles to the federal government's ability to regulate firearms:

> Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use . . . .

514 U.S. at 602-03 (Stevens, J., dissenting). Justice Thomas spoke to the Second Amendment issue more directly in his concurrence in *Printz*, in words that suggested that he may well support the traditional individual rights view:

> This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries § 1890, p. 746 (1833).

521 U.S. at 938-39 (Thomas, J., concurring) (emphasis in original).[9]

Finally, we note that, after his retirement, Chief Justice Warren Burger uttered one of the most widely publicized comments about the Second Amendment ever made by a Justice inside or outside the context of a judicial opinion. In an interview, former Chief Justice Burger stated that the traditional individual rights view was:

> one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I've ever seen in my lifetime.

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[9] Justice Thomas did not explain why it was relevant that the Court had not ruled on the issue recently or why a Second Amendment decision might be of less force if it was handed down by an earlier Court.

> The real purpose of the Second Amendment was to ensure that state armies — the militia — would be maintained for the defense of the state. The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.

Warren E. Burger, *The Right to Bear Arms*, PARADE MAGAZINE, Jan. 14, 1990, at 4. Although we in no way share Chief Justice Burger's view that Second Amendment enthusiasts are guilty of fraud, we do generally agree with his statements regarding the Amendment's purpose and scope.

Our court, like every other federal court of appeals to reach the issue except for the Fifth Circuit, has interpreted *Miller* as rejecting the traditional individual rights view. In *Hickman v. Block*, we held that "the Second Amendment guarantees a collective rather than an individual right." 81 F.3d at 102 (citation and quotation marks omitted).[10] Like the other courts, we reached our conclusion regarding the Second Amendment's scope largely on the basis of the rather cursory discussion in *Miller*, and touched only briefly on the merits of the debate over the force of the amendment. *See id.*[11]

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[10] In *Hickman*, we held that an individual could not bring a Second Amendment challenge to a California law which requires that a permit be obtained in order to carry a concealed weapon, and, as noted in the text, unambiguously adopted the view that the Second Amendment establishes a collective right. Nevertheless, just six days after the issuance of that decision, Judge Alex Kozinski, acknowledgedly an extremely able and dedicated jurist, appeared to cling fast to the individual rights view, despite the existence of binding circuit precedent to the contrary that may in no way be dismissed as dicta. *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996). The two other judges in *Gomez*, one of whom was the author of *Hickman*, refused to join in the footnote.

[11] *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States v.*

Appellants contend that we misread *Miller* in *Hickman*.[12] They point out that, as we have already noted,

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Wright, 117 F.3d 1265, 1273-74 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

Although the majority of circuit courts have, with comparatively little analysis, adopted the collective rights view, the Third and Tenth Circuits appear to have suggested the possible use of some form of intermediate model. In rejecting a criminal defendant's Second Amendment defense to a gun possession charge, the Tenth Circuit stated: "To apply the [Second] [A]mendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy." *Oakes*, 564 F.2d at 387. In *Rybar*, the Third Circuit concluded that: "Rybar [has not] establish[ed] that his firearm possession bears a reasonable relationship to 'the preservation or efficiency of well-regulated militia.' " 103 F.3d at 286 (quoting *Miller*, 307 U.S. at 178).

It appears that only the Second and District of Columbia Circuits have not taken a position, considered or otherwise, on the nature of the right established by the Second Amendment. *See Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) ("Despite the intriguing questions raised, we will not attempt to resolve the status of the Second Amendment right . . . .").

[12] Since *Hickman*, we have cited its holding, with little discussion, in a few criminal cases in which the defendant raised a general Second Amendment defense to various firearms convictions along with other defenses that relate more specifically to the particular offenses alleged. *See, e.g., United States v. Hinostroza*, 297 F.3d 924 (9th Cir. 2002); *United States v. Mack*, 164 F.3d 464, 474 (9th Cir. 1999); *see also United*

Miller, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion. We agree that our determination in *Hickman* that *Miller* endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it. This is particularly so because, since *Hickman* was decided, there have been a number of important developments with respect to the interpretation of the highly controversial provision: First, as we have noted, there is the recent *Emerson* decision in which the Fifth Circuit, after analyzing the opinion at length, concluded that the Supreme Court's decision in *Miller* does not resolve the issue of the Amendment's meaning. The *Emerson* court then canvassed the pertinent scholarship and historical materials, and held that the Second Amendment does establish an individual right to possess arms — the first federal court of appeals ever to have so decided.[13] Second,

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States v. Hancock, 231 F.3d 557, 566 (9th Cir. 1999) (holding that, because the Second Amendment does not create an individual right to arms, an equal protection challenge to a gun control law is reviewed "under the rational-basis standard."). In the present civil constitutional challenge to a gun control statute, unlike the criminal cases in which the Second Amendment was raised along with a number of more specific defenses, the question of the Second Amendment's scope is the principal issue before the court and has been thoroughly briefed and argued by the parties.

[13] The *Emerson* court examined the government's briefs in *Miller*, and observed that in that case the government made alternative arguments: first, that the Second Amendment does not establish an individual right to possess arms, and second, that the sawed-off shotgun at issue in *Miller* bore no reasonable relationship to militia service. 270 F.3d at 221-24. In the view of the *Emerson* court, the Supreme Court's opinion in *Miller* adopted the government's second argument, and not its first, which is not an unreasonable conclusion. That conclusion does

the current leadership of the United States Department of Justice recently reversed the decades-old position of the government on the Second Amendment, and adopted the view of the Fifth Circuit. Now, for the first time, the United States government contends that the Second Amendment establishes an individual right to possess arms.[14] The Solicitor General has advised the Supreme Court that "[t]he current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions . . . ." Opposition to Petition for Certiorari in *United States v. Emerson*, No. 01-8780, at 19 n.3. In doing so, the Solicitor General transmitted to the Court a memorandum from Attorney General John Ashcroft to all United States Attorneys adopting the Fifth Circuit's view and emphasizing that the *Emerson* court

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not, however, lead to the result the Fifth Circuit then reaches. In our view, the government's second argument supports either the collective rights view or the limited individual rights view, but not the traditional individual rights doctrine that the Fifth Circuit adopts. Moreover, in an attempt to reconcile its position with *Miller*, the Fifth Circuit modifies that doctrine by asserting that certain undefined types of arms are excluded from the amendment's coverage. *Miller* suggests that the arms protected by the amendment, if any, are those related to militia service, but *Emerson* strays far from that view. While it is unclear precisely what types of arms the Fifth Circuit would deem included or excluded, *Emerson*'s conclusion that the Second Amendment protects private gun ownership so long as the weapons have "legitimate use in the hands of private individuals," 270 F.3d at 223, represents a far different approach from that stated in *Miller*. In our view, the Fifth Circuit's decision is incompatible with the Supreme Court ruling.

[14] *See* Opposition to Petition for Certiorari in *United States v. Emerson*, No. 01-8780, at 19 n.3, *available at* www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf.

"undertook a scholarly and comprehensive review of the pertinent legal materials . . . ," although the Attorney General was as vague as the Fifth Circuit with respect both to the types of weapons that he believes to be protected by the Second Amendment, and the basis for making such determinations. *Id.*, app. A.

The reversal of position by the Justice Department has caused some turmoil in the lower courts, and has led to a number of challenges to federal statutes relating to weapons sales, transport, and possession, including a heavy volume in the district courts of this circuit. *See, e.g., United States v. Stepney*, No. 01-0344, 2002 WL 1460258 (N.D. Cal. July 1, 2002); Jason Hoppin, *No Free Ride For Gun Argument*, THE RECORDER, July 25, 2002 (discussing Second Amendment defenses raised by criminal defendants in Northern District of California cases). Similar Second Amendment defenses have been raised by criminal defendants throughout the nation as a result of the Justice Department's new position on the amendment. *See* Adam Liptak, *Revised View of Second Amendment Is Cited As Defense in Gun Cases*, N.Y. TIMES, July 23, 2002, at A1.

Given the dearth of both reasoned and definitive judicial authority, a particularly active academic debate has developed over the scope of the Second Amendment. *Compare, e.g.* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (advocating individual rights view) *and* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (same) *with* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 294 (2000) (advocating collective rights view); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 124 (2000) (same); *and* David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588 (2000) (same). As a result of the renewed interest in the issue, the Second Amendment has been the subject of a number of scholarly symposia. *See, e.g., The*

Second Amendment: Fresh Looks, 76 CHI.-KENT L. REV. 3-715 (2000); *Second Amendment Symposium*, 1998 B.Y.U. L. REV. 1-336; *A Second Amendment Symposium Issue*, 62 TENN. L. REV. 443-821 (1995). Indeed, Second Amendment scholarship has become so active that the scholarship itself has become the subject of study. *See* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000).

In light of the United States government's recent change in position on the meaning of the amendment, the resultant flood of Second Amendment challenges in the district courts, the Fifth Circuit's extensive study and analysis of the amendment and its conclusion that *Miller* does not mean what we and other courts have assumed it to mean, the proliferation of gun control statutes both state and federal, and the active scholarly debate that is being waged across this nation, we believe it prudent to explore Appellants' Second Amendment arguments in some depth, and to address the merits of the issue, even though this circuit's position on the scope and effect of the amendment was established in *Hickman*. Having engaged in that exploration, we determine that the conclusion we reached in *Hickman* was correct.[15]

B. Appellants Lack Standing to Challenge the Assault Weapons Control Act on Second Amendment Grounds.

[2] Appellants contend that the California Assault Weapons Control Act and its 1999 revisions violate their Second Amendment rights. We unequivocally reject this contention. We conclude that although the text and structure of the amendment, standing alone, do not

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[15] If our review had led us to a conclusion contrary to that reached in *Hickman*, we of course would not attempt to overrule that decision in this opinion. Instead, we would be required to call for en banc review. *See Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993) ("[O]nly the court sitting en banc may overrule a prior decision of the court."). Because we reaffirm *Hickman* here, however, an en banc call by the panel is not necessary.

conclusively resolve the question of its meaning, when we give the text its most plausible reading and consider the amendment in light of the historical context and circumstances surrounding its enactment we are compelled to reaffirm the collective rights view we adopted in *Hickman*: The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use. This conclusion is reinforced in part by *Miller*'s implicit rejection of the traditional individual rights position.[16] Because we hold that the Second Amendment does not provide an individual right to own or possess guns or other firearms,[17] plaintiffs lack standing to challenge the AWCA.[18]

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[16] Although *Miller* is consistent with both the limited individual rights position and the collective rights view, for reasons we explain below we continue to adhere to the collective rights view we adopted in *Hickman*.

[17] We concluded in *Hickman* that because the individual plaintiff had no legally protectable interest under the Second Amendment, he lacked constitutional standing to bring a claim under that provision. Other courts have addressed Second Amendment claims on the merits, rather than under the rubric of standing doctrine. *See, e.g., Gillespie*, 185 F.3d at 710 (offering an informed discussion not only of the standing issue but also of some of the amendment's possible applications). Although in every case we are required to examine standing issues first, *see, e.g., Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 653-54 (9th Cir. 2002) ("We must establish jurisdiction before proceeding to the merits of the case."), here an examination of that question requires us as a first step to conduct a thorough analysis of the scope and purpose of the Second Amendment. Only after determining the amendment's scope and purpose can we answer the question whether individuals, specifically the plaintiffs here, have standing to sue. Thus, as a practical matter, the choice of jurisprudential approach makes little or no difference. Because we held in *Hickman* that the absence of an individually enforceable Second Amendment right resulted in a lack of standing, we follow our precedent and decide the case on that basis here.

In *Hickman*, we did not rely on our earlier decision in *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992), that the Second Amendment is not incorporated by the Fourteenth and does not constrain actions by the states, although we noted in dictum that had standing existed, *Fresno Rifle* would be applicable. We undoubtedly followed that approach in *Hickman* because, as noted above, we must decide standing issues first. *Fresno Rifle* itself relied on *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Presser v. Illinois*, 116 U.S. 252 (1886), decided before the Supreme Court held that the Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause. Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13. Because we decide this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states.

[18] Our concurring colleague, Judge Magill, says that we should simply decide the case on standing as did *Hickman*. That is precisely what we do. *Hickman* first examined the scope and purpose of the Second Amendment, and adopted one of the three principal theories regarding its meaning. It did so in order to resolve the standing question. In fact, it is impossible to decide standing without undertaking the type of analysis which our colleague wishes us to avoid. Only after determining that the collective view of the Second Amendment was correct was the *Hickman* court able to conclude that the individual plaintiff had no standing. We reach the same conclusion as to the collective view after conducting a similar analysis and, by virtue of doing so, we are also able to reach the same conclusion as to standing.

The difference between our decision and *Hickman* is twofold. Since *Hickman* was decided, there have been extensive developments in the area of Second Amendment law. We take account of these developments and, after analyzing them, conclude that the result reached in *Hickman* does not change.

1. The Text and Structure of the Second Amendment Demonstrate that the Amendment's Purpose is to Preserve Effective State Militias; That Purpose Helps Shape the Content of the Amendment.

[3] The Second Amendment states in its entirety: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. As commentators on all sides of the debate regarding the amendment's meaning have acknowledged, the language of the amendment alone does not conclusively resolve the question of its scope. Indeed, the Second Amendment's text has been called "puzzling,"[19] "an enigma,"[20] and "baffling"[21] by scholars of varying ideological persuasions.[22] What renders the language and structure

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Second, *Hickman* based its conclusion principally on a reading of *Miller* that appears to be incorrect: *Miller* neither adopts nor rejects the collective view. Because we believe *Hickman* reached the correct result on a significant constitutional issue currently being raised with some frequency in the district courts, we think it important to ground our circuit law on more solid constitutional reasoning and analysis. Given the plaintiffs' direct challenge to *Hickman*, the importance of the issue, and the extensive continuing judicial debate on the subject, it is, contrary to our colleague's view, in no way improper for us to reconsider *Hickman* in order to decide whether to (a) simply follow it without comment, (b) reaffirm it after considering intervening developments and engaging in a fuller constitutional analysis, or (c) request en banc review of the case before us.

[19] Dorf, *supra*, at 294.

[20] Stephen J. Heyman, *Natural Rights and the Second Amendment*, 76 CHI.-KENT L. REV. 237, 238 (2000).

[21] L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1360 (1997).

[22] Even the learned Professor Tribe has appeared stymied by the task of construing the Second Amendment. In the first two editions of his treatise on constitutional law, he advocated the collective rights position. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988)

of the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights.[23] Our analysis thus

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("[T]he sole concern of the [S]econd [A]mendment's framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy. Thus the inapplicability of the [S]econd [A]mendment to purely private conduct . . . comports with the narrowly limited aim of the amendment as merely ancillary to other constitutional guarantees of state sovereignty."). However, in the treatise's third edition Professor Tribe tentatively concluded that the amendment provides "a right (admittedly of uncertain scope) on the part of individuals," although he left unresolved many of the more difficult questions regarding the amendment's practical effect, concluding unhelpfully that "the Second Amendment provides fertile ground in which to till the soil of federalism and to unearth its relationship with individual as well as collective notions of rights." LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 902 n.221 (Foundation Press, 3d ed. 2000). Soon after the third edition of the treatise was sent to press, Professor Tribe, in concert with another equally puzzled law school professor, appeared to equivocate even further regarding the scope of the amendment's protections. The two professors abandoned constitutional analysis almost entirely and retreated to a wholly pragmatic and political, though overly optimistic, discussion of how the two sides to the bitter Second Amendment debate could live happily ever after by reaching reasonable practical accommodations of their sharply conflicting constitutional views. Laurence H. Tribe & Akhil Reed Amar, *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31.

[23] Professor Levinson is of the view that another constitutional provision includes a similar type of preamble. He argues that the Copyright and Patent Clause, which states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. CONST. art. I, § 8, has a structure analogous to that of the Second Amendment. *See* Levinson, *supra*. In our view, this is

must address not only the meaning of each of the two clauses of the amendment but the unique relationship that exists between them.

a. The Meaning of the Amendment's First Clause: "A Well-Regulated Militia Being Necessary to the Security of A Free State."

The first or prefatory clause of the Second Amendment sets forth the amendment's purpose and intent. An important aspect of ascertaining that purpose and intent is determining the import of the term "militia." Many advocates of the traditional individual rights model, including the Fifth Circuit, have taken the position that the term "militia" was meant to refer to all citizens, and, therefore, that the first clause simply restates the second in more specific terms. *See Emerson*, 270 F.3d at 235 ("Militia . . . was understood to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large."). Relying on their definition of "militia," they conclude that the prefatory clause was intended simply to reinforce the grant of an individual right that they assert is made by the second clause. *See id.* At 236.[24] We agree with the

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highly doubtful; the first phrase of the Copyright and Patent Clause appears to set forth the substantive power granted to Congress, not the limitation on such a power.

[24] Other advocates of the traditional individual rights model appear to read the first clause out of the amendment altogether. *See* Volokh, *supra*, at 807-09; *see also* Powe, Jr., *supra*, at 1336 ("[T]o some, like the National Rifle Association, the preface bears so little relevance to the right that the preface might as well have been written in invisible ink.") For instance, in an article that has attracted much comment, Professor Volokh points out that although prefatory clauses like that included in the Second Amendment are not found elsewhere in the federal constitutional text, they are commonplace in state constitutions. On the basis of the limited significance of the prefatory clauses in the state constitutions, the able professor

Fifth Circuit in a very limited respect. We agree that the interpretation of the first clause and the extent to which that clause shapes the content of the second depends in large part on the meaning of the term "militia." If militia refers, as the Fifth Circuit suggests, to all persons in a state, rather than to the state military entity, the first clause would have one meaning — a meaning that would support the concept of traditional individual rights. If the term refers instead, as we believe, to the entity ordinarily identified by that designation, the state-created and -organized military force, it would likely be necessary to attribute a considerably different meaning to the first clause of the Second Amendment and ultimately to the amendment as a whole.

[4] We believe the answer to the definitional question is the one that most persons would expect: "militia" refers to a state military force. We reach our conclusion not only because that is the ordinary meaning of the word, but because contemporaneously enacted provisions of the Constitution that contain the word "militia" consistently use the term to refer to a state military entity, not to the people of the state as a whole.

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maintains that the prefatory clause in the Second Amendment should not be read as restricting the right established in the operative clause. Volokh, *supra*, at 807-09. However, this interpretation results in the denial of any significance at all to the first part of the amendment, in violation of the well-established canon of interpretation that requires a court, wherever possible, to give force to each word in every statutory (or constitutional) provision. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955); *see Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 174 (1803). Moreover, as Professor Dorf, a leading exponent of the collective rights view, notes, the fact that preambles are common in state constitutions does not alter the fact that they are entirely atypical in the federal constitution. To the contrary, Professor Dorf says, the first clause of the Second Amendment ought to be attributed substantial weight, in part because it is so unusual. Dorf, *supra*, at 301. We find Professor Dorf's argument the more persuasive.

We look to such contemporaneously enacted provisions for an understanding of words used in the Second Amendment in part because this is an interpretive principle recently explicated by the Supreme Court in a case involving another word that appears in that amendment — the word "people."[25] That same interpretive principle is unquestionably applicable when we construe the word "militia." "Militia" appears repeatedly in the first and second Articles of the Constitution. From its use in those sections, it is apparent that the drafters were referring in the Constitution to the second of two government-established and -controlled military forces. Those forces were, first, the national army and navy,

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[25] Specifically, in *United States v. Verdugo-Urquidez*, the Court stated that the use of the word "people" should have the same meaning in the Second Amendment as it does throughout the Constitution:

"[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

494 U.S. 259, 265 (1990) (citations omitted).

We note that James Madison, no minor authority on the constitutional text, noted the arbitrariness of this interpretive approach. In doing so, in Federalist 37, he observed, "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally different ideas." THE FEDERALIST NO. 37, at 197 (Clinton Rossiter, ed., 1961). Nevertheless, we are bound by the views of the Supreme Court.

which were subject to civilian control shared by the president and Congress,[26] and, second, the *state militias*, which were to be "essentially organized and under control of the states, but subject to regulation by Congress and to 'federalization' at the command of the president." Paul Finkelman, *"A Well Regulated Militia": The Second Amendment in Historical Perspective*, 76 CHI.-KENT L. REV. 195, 204 (2000).

Article I also provides that the militia, which is essentially a state military entity, may on occasion be federalized; Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. The fact that the militias may be "called forth" by the federal government only in appropriate circumstances underscores their status as state institutions. Article II also demonstrates that the militia were conceived of as state military entities; it provides that the President is to be "Commander in Chief of the Army and Navy of the United States, and of the *Militia of the several States*, when called into the actual Service of the United States." *Id.* art. II. § 2, cl. 1 (emphasis added). Like the Second Amendment, not all of the provisions in Articles I and II refer specifically to the militia as "the state militia." Nevertheless, the contexts in which the term is used demonstrate that even without the prefatory word, "militia" refers to state military organizations and not to their members or potential members throughout these two Articles.

Our conclusion that "militia" refers to a state entity, a state fighting force, is also supported by the use of that term in another of the provisions of the Bill of Rights. The Fifth Amendment, enacted by the First Congress at the same time as the Second Amendment,

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[26] U.S. CONST. art. I, § 8, cls. 12-14 (granting the power "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval Forces.").

provides that a criminal defendant has a right to an indictment or a presentment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V. The inclusion of separate references to the "land or naval forces" and "the Militia," both of which may be in "actual service" to the nation's defense, indicates that the framers conceived of two formal military forces that would be active in times of war — one being the national army and navy, and the other the federalized state militia. Certainly, the use of "militia" in this provision of the Bill of Rights is most reasonably understood as referring to a state entity, and not to the collection of individuals who may participate in it.

Not only did the drafters of the Constitution use "militia" to refer to state military entities, so too did the drafters of the Constitution's predecessor document, the Articles of Confederation. The Articles provided that "every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." THE ARTICLES OF CONFEDERATION art. 6 (1777), *in* DOCUMENTS OF AMERICAN HISTORY 112 (Henry Steele Commager ed., 7th ed. 1963). The "well regulated and disciplined militia[s]" described by the Articles of Confederation were quite clearly those institutions established by the individual states. Thus, the prevailing understanding both before and at the time of the adoption of the Constitution was that a "militia" constituted a state military force to which the able-bodied male citizens of the various states might be called to service.

To determine that "militia" in the Second Amendment is something different from the state entity referred to whenever that word is employed in the rest of the Constitution would be to apply contradictory interpretive methods to words in the same provision. The

interpretation urged by those advocating the traditional individual rights view would conflict directly with *Verdugo-Urquidez*. If the term "the people" in the latter half of the Second Amendment must have the same meaning throughout the Constitution, so too must the phrase "militia."[27]

Our reading of the term "militia" as referring to a state military force is also supported by the fact that in the amendment's first clause the militia is described as "necessary to the security of a free State." This choice of language was far from accidental: Madison's first draft of the amendment stated that a well-regulated militia was "the best security of a free country." Anti-Federalist Elbridge Gerry explained that changing the language to "necessary to the security of a free State" emphasized the primacy of the state militia over the federal standing army: "A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." Yassky, *supra*, at 610 (quoting THE CONGRESSIONAL REGISTER, August 17, 1789). In any event, as we will explain *infra* at 32, 45-47, 53-55, it is clear that the drafters believed the militia that provides the best security for a free state to be the permanent state militia, not some amorphous
body of the people as a whole, or whatever random and informal collection of armed individuals may from time to time appear on the scene for one purpose or another.

Finally, our definition of "militia" is supported by the inclusion of the modifier "well regulated." As an

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[27] Professor Jack Rakove, an eminent historian, in criticizing the logic underlying the traditional individual rights position, observes that " '[p]eople' is routinely defined [by advocates of the traditional individual rights position] intratextually, by reference to use in other amendments, but 'militia' leaps beyond the proverbial four corners of the document, and is parsed [by those advocates] in terms of a historically contingent definition of what the militia has been and must presumably evermore be." Rakove, *supra*, at 124.

historian of the Founding Era has noted, the inclusion of that phrase "further shows that the Amendment does not apply to just anyone." Finkelman, *supra*, at 234. The Second Amendment was enacted soon after the August 1786 – February 1787 uprising of farmers in Western Massachusetts known as Shays Rebellion. What the drafters of the amendment thought "necessary to the security of a free State" was not an "unregulated" mob of armed individuals such as Shays band of farmers, the modern-day privately organized Michigan Militia, the type of extremist "militia" associated with Timothy McVeigh and other militants with similar anti-government views, groups of white supremacists or other racial or religious bigots, or indeed any other private collection of individuals. To the contrary, "well regulated" confirms that "militia" can only reasonably be construed as referring to a military force established and controlled by a governmental entity.

After examining each of the significant words or phrases in the Second Amendment's first clause, we conclude that the clause declares the importance of state militias to the security of the various free states within the confines of their newly structured constitutional relationship. With that understanding, the reason for and purpose of the Second Amendment becomes clearer.

b. The Meaning of the Amendment's Second Clause: "The Right of the People to Keep and Bear Arms, Shall Not Be Infringed."

[5] Having determined that the first clause of the Second Amendment declares the importance of state militias to the proper functioning of the new constitutional system, we now turn to the meaning of the second clause, the effect the first clause has on the second, and the meaning of the amendment as a whole. The second clause — "the right of the people to keep and bear Arms, shall not be infringed" — is not free from ambiguity. We consider it highly significant, however, that the second clause does not purport to protect the right to "possess" or

"own" arms, but rather to "keep and bear" arms. This choice of words is important because the phrase "bear arms" is a phrase that customarily relates to a military function.

[6] Historical research shows that the use of the term "bear arms" generally referred to the carrying of arms in military service — not the private use of arms for personal purposes.[28] For instance, Professor Dorf, after canvassing documents from the founding era, concluded that "[o]verwhelmingly, the term had a military connotation." Dorf, *supra*, at 314. Our own review of historical documents confirms the professor's report.[29]

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[28] The *Emerson* court points to a few uses of the phrase "bear arms" that do not refer to military service, primarily in the Report of the Pennsylvania Minority, prepared by those members of the Pennsylvania Ratifying Convention who dissented from that state's decision to ratify the Constitution. The Pennsylvania minority report is one of the few contemporaneous documents to refer to a private right to arms. However, its view was doubly rejected: first, by the Pennsylvania convention, which chose not to recommend to the new Congress any amendment related to the regulation of arms, and second, by the First Congress, which adopted the Second Amendment rather than the individual rights proposal of the Pennsylvania minority.

[29] For instance, the Declaration of Independence cites as a grievance against the British Crown the fact that Great Britain impressed into the British Navy Americans captured on the high seas, and forced the prisoners to "bear arms" against their countrymen. THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776). The Continental Congress frequently used the term when permitting prisoners of war to be released to Britain, conditioning their release on the prisoners' "parole not to bear arms against the United States or their allies during the war." 14 JOURNALS OF THE CONTINENTAL CONGRESS 826 (July 14, 1779). Similarly, in giving instruction to General Washington to conduct an exchange of prisoners of war with Britain, Congress instructed that the exchanged prisoners be prohibited from active service in the military: "That hostages be mutually given as a security that the Convention troops and

The Tennessee Supreme Court, in the most significant judicial decision to construe the term "bear arms," concluded that it referred to the performance of a military function: "A man in pursuit of deer, elk and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms." *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840).[30] Other nineteenth-century judicial opinions evince that same understanding of the term, as it appears in the Constitution. *See English v. State*, 35 Tex. 473, 476 (1872) ("The word 'arms' in the connection we find it in the Constitution of the United States refers to the arms of a militiaman or soldier, and the word is used in its military sense."); *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891) ("[I]n regard to the kind of arms referred to in the [Second A]mendment, it must be held to refer to the weapons of warfare to be used by the militia."); *see also* Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915) ("The single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as 'bearing arms.' "). Further, the Oxford English Dictionary defines "to bear arms" as "to serve as a soldier, do military service, fight." 1 OXFORD ENGLISH DICTIONARY 634 (J.A. Simpson & E.S.C.

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those received in exchange for them do not bear arms prior to the first day of May next." 18 JOURNALS OF THE CONTINENTAL CONGRESS 1030 (Nov. 17, 1780).

[30] The Fifth Circuit dismisses the *Aymette* decision because it believed that the constitutional provision relied on by the Tennessee court granted free white men the right to "keep and bear arms for their common defense." According to the *Emerson* court, the "common defense" language, which is not present in the Second Amendment, rendered the interpretation of the *Aymette* court inapplicable here. However, the Tennessee court reached its conclusion primarily because of a different provision of the state constitution that did not include the "common defense" language.

Thus, the Fifth Circuit's attempt to distinguish *Aymette* fails.

Weiner, eds., 2d ed. 1989) (quoted in Yassky, *supra*, at 619). Thus, the use of the phrase "bear arms" in its second clause strongly suggests that the right that the Second Amendment seeks to protect is the right to carry arms in connection with military service. We also believe it to be significant that the first version of the amendment proposed by Madison to the House of Representatives concluded with an exemption from "bearing arms" for the "religiously scrupulous." THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (Neil H. Cogan ed., 1997) [hereinafter BILL OF RIGHTS] ("[N]o person religiously scrupulous of bearing arms, shall be compelled to render military service in person."). Historians have observed that "[n]o state at the time, nor any state before, had ever compelled people to carry weapons in their private capacity." Finkelman, *supra*, at 228. Accordingly, the exemption from bearing arms for the religiously scrupulous can only be understood as an exemption from carrying arms in the service of a state militia, and not from possessing arms in a private capacity. Otherwise, Madison's insertion of the religiously-scrupulous exception in the first draft of the present amendment would have made no sense at all.[31]

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[31] The use of "bear arms" in Madison's proposal for a conscientious objector proposal is identical to its use in a number of suggested amendments offered by the state ratifying conventions. In Virginia, for example, George Wythe suggested a proposed constitutional amendment that, like Madison's first draft of the Second Amendment, quite evidently uses "bear arms" to mean military service: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (Jonathan Elliott ed., 2d ed. 1866) [hereinafter DEBATES]; *see also* 1 DEBATES, *supra*, at 335 (Rhode Island Ratifying Convention Proposed Amendments) ("That any person religiously scrupulous of bearing arms ought

[7] Finally, we address the use of the term "keep" in the second clause. The reason why that term was included in the amendment is not clear. The *Emerson* court, citing no authority, concludes that "keep" does not relate to military weapons and therefore the use of the word supports the position that the amendment grants individuals the right to keep arms for personal use. 270 F.3d at 232. There appears to be little logic or reason to that analysis. Arms can be "kept" for various purposes — military, social, or criminal. The question with respect to the Second Amendment is not whether arms may be kept, but by whom and for what purpose. If they may be kept so that the possessor is enabled to "bear arms" that are required for military service, the words would connote something entirely different than if they may be kept for any individual purpose whatsoever. In this connection, some scholars have suggested that "keep and bear" must be construed together (like "necessary and proper") as a unitary phrase that relates to the maintenance of arms for military service. *See* Dorf, *supra*, at 317. That argument appears to us to have considerable merit. Certainly the right to keep arms is of value only if a right to use them exists. The only right to use arms specified in the Constitution is the right to "bear" them. Thus, it seems unlikely that the drafters intended the term "keep" to be broader in scope than the term "bear." Any other explanation would run into considerable logical and historical difficulty. Furthermore, historians have noted that the right of the *states* to "keep" arms was a catalyst for the Revolution — it was the British troops' attempts to capture the Massachusetts militia's arsenal that prompted Paul Revere's warning and the battles at Lexington and Concord to defend the *states'* stores of munitions. Finkelman, *supra*, at 234. Accordingly, the ability of states to "keep" arms for military use without external interference undoubtedly was prominent in the minds of

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to be exempted upon payment of an equivalent to employ another to bear arms in his stead.").

many founders. In the end, however, the use of the term "keep" does not appear to assist either side in the present controversy to any measurable extent. Certainly, the use of the term does not detract from the significance of the drafters' decision to protect the right to "bear" arms rather than to "own" or "possess" them. Thus, it in no way undercuts the strong implication that the right granted by the second clause relates to the performance of a military function, and not to the indiscriminate possession of weapons for personal use.

c. The Relationship Between the Two Clauses.

Our next step is to consider the relationship between the two clauses, and the meaning of the amendment as a whole. As we have noted, and as is evident from the structure of the Second Amendment, the first clause explains the purpose of the more substantive clause that follows, or, to put it differently, it explains the reason necessitating or warranting the enactment of the substantive provision.[32] Moreover, in this case, the first clause does more than simply state the amendment's purpose or justification: it also helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself. This approach is consistent with that taken by the Supreme Court regarding the Preamble to the Constitution in a number of other instances. *See, e.g., U.S. Term Limits v. Thornton*, 514 U.S. 779, 821 n.31 (1995) (pointing to language in the Preamble to the Constitution to determine the nature of representation established in that document). More important, it is the approach that the

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[32] As Professor John Hart Ely has observed, "here, as almost nowhere else, the framers and ratifiers apparently opted against leaving to the future the attribution of purposes, choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted." ELY, DEMOCRACY AND DISTRUST 95 (1980).

Supreme Court has specifically declared must be employed when seeking to determine the meaning of the Second Amendment.[33]

[8] When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, we believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise. This conclusion is based in part on the premise, explicitly set forth in the text of the amendment, that the maintenance of effective state militias is essential to the preservation of a free State, and in part on the historical meaning of the right that the operative clause protects — the right to bear arms. In contrast, it seems reasonably clear that any fair reading of the "bear Arms" clause with the end in view of "assuring . . . the effectiveness of" the state militias cannot lead to the conclusion that the Second Amendment guarantees an individual right to own or possess weapons for personal and other purposes. *See, e.g., Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999) (adopting the collective rights theory and concluding that firearms possession related to militia service represents too attenuated a connection to the purpose and objective of the Second Amendment to support a claim of an individual right).

In the end, however, given the history and vigor of the dispute over the meaning of the Second Amendment's language, we would be reluctant to say that the text and structure alone establish with certainty which of the various views is correct. Fortunately, we have available a

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[33] As we have noted, *supra* p. 14, the *Miller* Court stated: "With the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" 307 U.S. at 178 (emphasis added).

number of other important sources that can help us determine whether ours is the proper understanding. These include records that reflect the historical context in which the amendment was adopted, and documents that contain significant portions of the contemporary debates relating to the adoption and ratification of the Constitution and the Bill of Rights. We now examine those sources, all of which ultimately point to the same result to which our analysis of the text leads us.

2. The Historical Context of the Second Amendment and the Debates Relevant to its Adoption Demonstrate that the Founders Sought to Protect the Survival of Free States by Ensuring the Existence of Effective State Militias, Not by Establishing An Individual Right to Possess Firearms.

An examination of the historical context surrounding the enactment of the Second Amendment leaves us with little doubt that the proper reading of the amendment is that embodied in the collective rights model. We note at the outset that the interpretation of the Second Amendment lends itself particularly to historical analysis. The content of the amendment is restricted to a narrow, specific subject that is itself defined in narrow, specific terms. Only one other provision of the Bill of Rights is similarly composed — the almost never used Third Amendment.[34] The other eight amendments all employ broad and general terms, such as "no law respecting" (the Free Exercise Clause), "unreasonable" (searches and seizures), "due process of law" (for deprivations of life, liberty, and property), "cruel and unusual" (punishments). Even the Ninth and Tenth Amendments speak vaguely of "other" rights or unenumerated "reserved" rights. The use of narrow,

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[34] The Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner prescribed by law."

specific language of limited applicability renders the task of construing the Second Amendment somewhat different from that which we ordinarily undertake when we interpret the other portions of the Bill of Rights.

What our historical inquiry reveals is that the Second Amendment was enacted in order to assuage the fears of Anti-Federalists that the new federal government would cause the state militias to atrophy by refusing to exercise its prerogative of arming the state fighting forces, and that the states would, in the absence of the amendment, be without the authority to provide them with the necessary arms. Thus, they feared, the people would be stripped of their ability to defend themselves against a powerful, over-reaching federal government. The debates of the founding era demonstrate that the second of the first ten amendments to the Constitution was included in order
to preserve the efficacy of the state militias for the people's defense — not to ensure an individual right to possess weapons. Specifically, the amendment was enacted to guarantee that the people would be able to maintain an effective state fighting force — that they would have the right to bear arms in the service of the state.

a. The Problem Of Military Power in the Colonies and Confederation.

A significant motivation for the American colonists' break from Britain was a distrust of the standing army maintained by the Crown on American shores. Dorf, *supra*, at 308. Indeed, one of the principal complaints listed in the Declaration of the Independence was that King George III "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Standing armies in the colonial era were looked on with great skepticism: "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of

country and laws could be secured through the Militia." *Miller*, 307 U.S. at 179. Even after the break with Britain, a large portion of Americans had grave reservations about establishing a permanent standing army.[35] Nevertheless, many other newly independent Americans expressed the need to strengthen the federal fighting force, even in peacetime. During the brief period in which the Articles of Confederation were in effect, from 1781-1789, relatively weak federal authority existed, particularly as related to military matters. The bulwark of the national defense was the state militias, which bodies the states could voluntarily contribute to the services of the Confederation. The states retained the sole power to arm and otherwise to maintain their respective militias. The Articles of Confederation specifically granted that power (and obligation) to the states: "[E]very state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage." THE ARTICLES OF CONFEDERATION, *supra*, art. 6. It is highly significant that prior to the enactment of the Constitution, the prevailing understanding as expressed in the governing charter then in effect was that the responsibility of arming their militias belonged to the states, not the federal

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[35] A number of early state constitutions included provisions prohibiting the maintenance of standing armies by the executive branch. The Massachusetts provision is typical: "And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in exact subordination to the civil authority, and be governed by it." MASS. CONST. pt. I, art. XVII (1780), *in* BILL OF RIGHTS, *supra*, at 183. *See also* DELAWARE DECLARATION OF RIGHTS, § 19 (1776) ("That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature."), *in* BILL OF RIGHTS, *supra*, at 183.

government and not the individual militiamen.[36] It was this function of the states, albeit no longer an exclusive one after the Constitution was adopted, that the Anti-Federalists attempted to preserve, through the enactment of the Second Amendment, in order to ensure that the militias would be effective. Many leaders of the Revolution expressed concern that as the Continental Army disbanded following the cessation of hostilities with England, the various state militias were inadequate to provide for the common defense due to their poor training and equipment.[37] The establishment of a national armed

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[36] Some states, particularly during the Articles of Confederation period, in turn required individual militiamen to bring their own arms for militia service. See *Miller*, 307 U.S. at 180-82 (citing statutes). As we observed in *Hickman*, however, "in practice, the command" that militiamen arm themselves "was ignored." 81 F.3d at 103 n.8. In many other states, both the official and the actual responsibility for arming the militia rested, as the Articles of Confederation contemplated, with the state governments. The Georgia statute was typical; the state was required to "Arm and Array the militia for suppressing all such insurrections, as may happen." Act of 1778, in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA: STATUTES COLONIAL AND REVOLUTIONARY, 1774 to 1805, at 104 (1970). Regardless of where the official responsibility rested, however, the comments of Madison, Randolph, and others, made at the Constitutional Convention, cited *infra*, reflect the common understanding that the state militias were ill-equipped.

[37] During the period that the Articles were in effect, both George Washington and Henry Knox, who was to become the nation's first Secretary of War in the Washington Administration, urged the creation of a standing national military force, to no avail. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 411-13 (2000). Washington in particular felt that the need was acute; in 1783 he wrote a document entitled *Sentiments On A Peace Establishment*, in which he recommended establishing a national militia that would exist along with those maintained by the individual states.

force was one of the primary reasons that the Constitutional Convention in 1787 was convened. The issue pervaded the convention's debates. In Virginia Governor Edmund Randolph's opening speech at the convention — in which he suggested that the body reject the Articles of Confederation entirely in favor of a new constitution, rather than merely revise them — Randolph cited military reform as a principal reason for strengthening the federal charter: "[T]he confederation produced no security against foreign invasion . . . neither militia nor [state] draughts being fit for defence on such occasions." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17 (Max Farrand ed., rev. ed. 1937) [hereinafter CONVENTION RECORDS]. Randolph also "observ[ed] that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline." 2 *id.*, at 388. Other delegates to the Convention shared this view. Influential South Carolinian Charles Pinckney, for instance, maintained that a stronger federal government was necessary principally so as to maintain "a real military force." *Id.* at 332.[38] The compromise that the convention eventually reached, which granted the federal government the dominant control over the national defense, led ultimately to the enactment of the counter-balancing Second Amendment.

Subsequently, he wrote to John Adams in the wake of Shays's Rebellion that because of the lack of a unified national military force, "[w]e are fast verging to anarchy and confusion!" Letter from George Washington to James Madison (Nov. 5, 1786), *in* 29 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, at 51 (John Clement Fitzpatrick ed., 1931) (quoted in Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 65 (2000)).

[38] *See also* 2 DEBATES, *supra*, at 387 (Virginia Ratifying Convention) ("Have we not found from experience, that, while the power of arming and governing has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service?") (Statement of James Madison).

b. The Constitutional Convention and the Compromise of the Army and Militia Clauses

The minutes of the proceedings of the Constitutional Convention reveal that the delegates to the convention devoted substantial efforts to determining the proper balance between state and federal control of military matters. *See* Yassky, *supra*, at 599 (describing this issue as "one of the most contentious issues faced by the Philadelphia Convention."). *See also* 2 CONVENTION RECORDS, *supra*, at 380-89 (debates regarding the Militia Clauses). Despite the general view that "standing armies are dangerous to liberty," THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and over the objection of some Anti-Federalists, the delegates to the convention agreed that a national army was "potentially dangerous" but "necessary." Yassky, *supra*, at 605. Thus, Article I of the proposed constitution granted Congress the authority to establish a "National Army," and Article II established the President as commander-in-chief of that army. The delegates at Philadelphia also provided for the strengthening of the state militias, in part to provide a check on the new national army. "As the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia." 2 CONVENTION RECORDS, *supra*, at 388 (Statement of James Madison). Under the compromise reached by the delegates, the militias were strengthened by the grant to Congress of substantial responsibility for their management, although they remained essentially state entities. On the one hand, the Constitution granted Congress the power to prescribe methods of organizing, arming and disciplining the state militias. U.S. CONST. art. I, § 8, cl. 15. On the other, the states expressly retained the power to appoint militia officers and provide the militiamen with their training, in accordance with Congressional dictates, if any. *See Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (observing that the Militia Clauses were the result

of "[t]wo conflicting themes."). The provision that most troubled the Anti-Federalists, and that prompted the most strident calls for amendment to the proposed constitution, was the one that authorized Congress to provide arms to the militias. The disagreement among the delegates arose not over whether Congress should be able to arm the militias at all, but over whether that power should be exclusive or concurrent with a state power to provide such arms — as well as over how other responsibilities for the militias should be distributed between the state and federal governments. *Id.* Federalists[39] defended the compromise that was reached, which greatly increased federal involvement in the management of the militias, in part by arguing that stronger state militias would provide an important counterbalance to the new national army.[40] In an effort to persuade the nation at large to ratify the proposed constitution, both Hamilton and Madison in The Federalist Papers pointed out that the state militias might even be called upon to resist the federal army should that body become oppressive. For instance, in Federalist No. 46, Madison argued:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the

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[39] We use the terms "Federalist" and "Anti-Federalist" as they were originally intended and as they plainly read, as opposed to the current paradoxical distortions of the terms. For some inexplicable reason, the term "Federalist" is currently used to refer to those who favor devolving fundamentally national functions upon the individual states, rather than to those who favor granting to the national government the powers necessary to operate effectively and to promote the social compact that underlies American democracy.

[40] *See* 3 DEBATES, *supra*, at 392 ("If you give [the power to federalize the militia] not to Congress, it may be denied by the states. If you withhold it, you render a standing army absolutely necessary; for if they have not the militia, they must have such a body of troops as will be necessary for the general defence of the Union.") (statement of George Nicholas at the Virginia Ratifying Convention).

> devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. . . . Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

THE FEDERALIST NO. 46, at 267 (Clinton Rossiter ed., 1961).[41] *See also* THE FEDERALIST NO. 28, at 150 (Clinton Rossiter ed., 1961) (Hamilton). In sum, what the debates held at the constitutional convention make clear, as well as the compromise that resulted, is that the balance of military power between the states and the federal government, although now an anachronistic subject foreign to our mode of thinking, was, at the time of the founding, a preeminent and much-debated question.

c. Anti-Federalist Objections and the Ratification Debates

The Anti-Federalists sought to ensure that the people of the several states would enjoy the protection of effective state militias so that their new-found liberties would be preserved. To accomplish this purpose, they sought to

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[41] Advocates of the traditional individual rights view often quote Madison's observation that the American people have the "advantage of being armed" as conclusive evidence that the Founders intended to protect the personal ownership of firearms. *See, e.g., Emerson*, 270 F.3d at 249 n.3; Don B. Kates, Jr., *Gun Control: Separating Reality From Symbolism*, 20 J. CONTEMP. L. 353, 364 (1994). However, examination of those words in context, as set forth above, suggests that Madison was referring to armed citizens in the service of state governments, i.e., militiamen.

change, or at the least, to clarify, the nature of the proposed balance of military power between the state and federal governments. Despite the arguments advanced by Hamilton, Madison, and others,[42] federal control over state militias remained one of the central objections to the new charter on the part of Anti-Federalists. In particular, if the federal Congress were permitted to "organiz[e], arm[ ], and disciplin[e]" the militia, opponents of the Constitution contended, then Congress would have the implied power to *disarm* the state militias and thus the people as well. One of the principal arguments against ratification of the new Constitution was that it would take away from the states the right to arm the members of its militias, and thus could deprive the people of an effective counterforce to the new national army. Without an armed militia, the argument went, the people would be bereft of arms. For instance, Patrick Henry, a leading Anti-Federalist at the Virginia ratifying convention, attacked the grant of power that permitted Congress to arm the militias: By this [provision], sir, you see that [congressional] control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress.

> The power of appointing officers over men not disciplined or armed is ridiculous . . . .

3 DEBATES, *supra*, at 379 (Statement of Patrick Henry). George Mason's concerns were similar; he predicted that Congress would "neglect [the militia], and let them perish, in order to have a pretence of establishing a standing army." 3 DEBATES, *supra*, at 379. *See also* North

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[42] This was in Madison's early period, when he was an ally of Hamilton's; it was not until later that he joined Jefferson in organizing the political faction that became the Republican Party and opposed the policies of the Federalists, including President Washington and, more openly, those of President John Adams. *See* DAVID MCCULLOUGH, JOHN ADAMS 436, 475 (2001).

Carolina Ratification Debate, *in* BILL OF RIGHTS, *supra*, at 191 ("[Congress] can disarm the militia.") (Statement of Rep. Lenoir). The Anti-Federalists viewed the state militias as providing the only true opportunity for the people to bear arms. Luther Martin of Maryland's alarmist rhetoric was typical of those who complained that the new Constitution jeopardized the people's freedom because it deprived them of effective state militias and thus of their means of self-defense. Martin stated:

> It was urged [at Philadelphia] that, if after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops without limitations, the power over the militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace to the State governments; . . . and that every State in the Union ought to reject such a system with indignation, since, if the general government should attempt to oppress and enslave them, they could not have any possible means of self-defense . . . .

3 CONVENTION RECORDS, *supra*, at 209. The Anti-Federalist concern was that if Congress possessed exclusive power to arm the militia, the people would be incapable of resisting federal tyranny.[43] Although

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[43] The text of Article I does not state that Congress has *exclusive* power to arm the militia. The language indicates that the grant of power is permissive: Congress "may" arm the militia. Nothing in the Article or elsewhere in the Constitution appears to bar the states from choosing to arm their respective militias as they wish. Nevertheless, most prominent Anti-Federalists — whether motivated by sincere belief or by a desire to engage in the rhetoric at which they excelled — complained that the Militia Clauses were a dangerous extension of exclusive federal power. For instance, in a published exchange of letters with Federalist Oliver Ellsworth of Connecticut, prominent Anti Federalist Luther Martin of Maryland complained that the federal government has "the powers by which only the militia can be

Federalists, like Madison, responded that "[t]he power [to arm the militia] is concurrent, and not exclusive," BILL OF RIGHTS, *supra*, at 195, the Anti-Federalists remained adamant. From the perspective of history, the Anti-Federalists' worries that the new national government would permit the state militia to atrophy through neglect may seem to be inconsequential, because we have become so accustomed to the provision of defense being essentially a federal function, and so few of us remain concerned with any right of the people to take up arms against the federal government.[44] Nevertheless, such arguments were central to the Anti-Federalist critique of the proposed new government.

Despite the Anti-Federalist arguments regarding the dangers of the distribution of powers with respect to state militias, and the effect upon the people's ability to provide for their own defense, it soon became clear that the requisite number of states would ratify the new Constitution. Once it became apparent that ratification was likely, Anti-Federalists shifted their efforts from defeating the Constitution to securing amendments, to be adopted almost simultaneously, that would render the new system more to their liking. Six of the state ratifying conventions adopted petitions urging that the newly established federal government enact a series of constitutional amendments, many of which became a part of the Bill of Rights. Four of those six state conventions included proposed amendments related to the militia power: New York, Virginia, Rhode Island, and North

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organized and armed, and by the neglect of which they may be rendered utterly useless and insignificant." 3 CONVENTION RECORDS, *supra*, at 285.

[44] The Civil War and its consequences, including the adoption of the Fourteenth Amendment, appear to have settled a number of the theoretical issues that caused the Anti-Federalists such concern; the question of a national as opposed to state-by-state military defense force would also seem somewhat academic after World War I, World War II, the Cold War, and Al Qaeda.

Carolina all proposed amendments similar in wording to the Second Amendment in its final form. BILL OF RIGHTS, *supra*, at 181-83. Ratification debates from those states demonstrate that the proposed amendments had nothing to do with an individual right to possess arms, whether for personal or other use. Indeed, the ratification debates were almost entirely — but not completely — devoid of any mention of an individual right to own weapons.[45] Rather, the proposed amendments were the result of concerns expressed in the various ratifying conventions — similar to those expressed at the Constitutional Convention itself — regarding the "defin[ition of] the respective powers of two levels of government" over the militia, and particularly over whether states would have the authority to arm the militias. Rakove, *supra*, at 161; *see* Finkelman, *supra*, at 224-25 (citing state ratification debates from New York and Massachusetts).

One of the strongest attacks on the proposed treatment of the militia in the Constitution was delivered by George Mason at the Virginia ratifying convention:

> The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—

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[45] None of the major proposals for a Bill of Rights included any provision affording individuals such a right. For instance, two of the more prominent Anti-Federalist critics of the proposed constitution, Mason and Richard Henry Lee, both of Virginia, published highly influential objections to the new Constitution. However, although these two statesmen "articulated nearly all the major principles that would eventually be written into the Bill of Rights, [they] made no claim for a purely private right to arms." Uviller & Merkel, *supra*, at 482. Similarly, Thomas Jefferson, who was in France during the ratification period, suggested a number of changes to the new Constitution in a letter to Madison; although protection against standing armies was among his proposals, an individual right to possess arms was not. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *quoted in* Uviller & Merkel, *supra*, at 494.

> by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. . . . Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

3 DEBATES, *supra*, at 379 (Statement of George Mason). Mason, like other Anti-Federalists, feared that the neglect of the state militia would lead to the oppression of the people, because without an effective militia the people would be defenseless, and thus he urged that the people's right to an effective militia be secured by an amendment to the new Constitution. He, like the others, saw the people's right to selfdefense exclusively in terms of the maintenance of a strong militia. Thus, the Anti-Federalists worried that the federal government would deprive the militia of its arms, not that it would take personal weapons from individual citizens. In order to meet that concern, Mason proposed an amendment similar in wording to what became the Second Amendment. He believed that the amendment would guarantee the people a militia that the state would be free to arm and thus render effective. He justified it as a protection for the people against tyranny and oppression by the federal government:

> But we need not give [the federal government] power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet any one. *I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. I consider and fear the natural propensity of*

> *rulers to oppress the people. I wish only to prevent them from doing evil.* By these amendments I would give necessary powers, but no unnecessary power. If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us . . . .

Id. at 380 (emphasis added).

In short, to the extent that the ratification debates concerned firearms at all, the discussion related to the importance of ensuring that effective state militias be maintained, such militias being considered essential to the preservation of the people's freedom. Those who deemed the Constitution inadequate for this purpose, absent some amendment, emphasized the importance of the states' being afforded the right to arm their own militias, thus ensuring the people's right to maintain a military force for their self-defense.

There were only a few isolated voices that sought to establish an individual right to possess arms, and alone among the 13 colonies, New Hampshire, by a majority vote of the delegates to its ratifying convention, recommended a proposed amendment to the Constitution explicitly establishing a personal right to possess arms: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." Proposal 12 of the New Hampshire State Convention (June 21, 1788), *in* BILL OF RIGHTS, *supra*, at 181. The New Hampshire proposal is significant not only because it was substantially different from the proposals to emerge from the various other state conventions (which in turn were quite similar to that ultimately enacted as the Second Amendment), but also because it suggests that an amendment establishing an individual right to bear arms would have been worded quite differently from the Second Amendment. In no other state did a proposal to establish an individual right to possess arms gain significant support. For instance, while one member of the Pennsylvania ratifying convention

vociferously urged the inclusion of such a proposal in the recommendations made by that body to the First Congress,[46] his views, like those of another few elsewhere who called for the establishment of such a right, were soundly rejected.[47] As two commentators have observed, "the failure of Pennsylvania's one man 'minority' merely accentuates the fact that opinion favoring a personal right to arms independent of the militia remained highly marginal in state conventions outside of New Hampshire." Uviller & Merkel, *supra*, at 486.[48] In sum, a careful review of the ratification debates demonstrates beyond question that opponents of the new Constitution sought amendment of the Militia Clauses in order to preserve the people's right to maintain an effective military force for

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[46] *See The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, 3 THE COMPLETE ANTIFEDERALIST 151 (Herbert J. Storing, ed., 1981).

[47] The Pennsylvania minority, so frequently cited by the proponents of the individual rights view, also used language markedly different from that of the Second Amendment. Its proposal for a federal constitutional amendment, which was rejected in favor of the Second Amendment, would have unambiguously established a personal right to possess arms for personal purposes: "[N]o law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . ." *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents*, at 623-24 (*quoted in* Finkelman, *supra*, at 208).

[48] One other proposal for an amendment establishing an individual right to possess arms might be considered, at most, moderately significant, if only because it was advanced by prominent Massachusetts Anti-Federalist and revolutionary leader Samuel Adams. The proposal failed to attract the support of many Massachusetts delegates, and is included in the Report of the Minority which was issued at the conclusion of that state's ratifying convention. Report of the Massachusetts Minority, Feb. 6, 1788, *in* BILL OF RIGHTS, *supra*, at 181.

their self-defense, and not to afford individuals a constitutional right to possess weapons.[49]

d. The First Congress and the Second Amendment

By the conclusion of the process by which the Constitution was ratified, there were already countless proposals for altering the new governing charter; the Virginia convention alone offered forty. Finkelman, *supra*, at 216. Madison, who was responsible for many of the compromises reached at the Constitutional Convention, as well as for many of The Federalist Papers, represented Virginia in the First Congress, which met in New York in April, 1789. He deftly pre-empted Anti-Federalist efforts to change fundamentally the new Constitution by introducing twelve proposed amendments soon after the new legislature convened. Uviller and Merkel, *supra*, at 498-99. Madison was unenthusiastic about the idea of upsetting the delicate balances achieved by the delegates in Philadelphia by importing new concepts into the document. He sought to ensure that the amendment process left the "structure and stamina of the Govt. as little touched as possible."
Letter from James Madison to Edmund Randolph (June 15, 1789) (*quoted in* Finkelman, *supra*, at 220); *see also* Paul Finkelman, *James Madison and the Bill of Rights: "A Reluctant Paternity"*, 1990 SUP. CT. REV. 301, 309 (1991). The amendments Madison proposed sought to eliminate ambiguities in the document that had been ratified, or to

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[49] Professor Rakove takes traditional individual rights advocates to task in regard to their contrary analysis of the ratification process: "If Americans had indeed been concerned with the impact of the constitution on [the private right to arms], and addressed the subject directly, the proponents of the individual right theory would not have to recycle the same handful of references to the dissenters in the Pennsylvania Ratification Convention and the protests of several Massachusetts members against their state's proposed constitution, or to rip promising snippets of quotations from the texts and speeches in which they are embedded." Rakove, *supra*, at 109.

enumerate principles that he believed were implicit within it. *Id.*[50] The debates of the First Congress regarding Madison's proposed Second Amendment, like the debates at the Constitution's ratifying conventions, support the view that the amendment was designed to ensure that the people retained the right to maintain effective state militias, the members of which could be armed by the states as well as by the federal government. Otherwise, the anti-Federalists feared, the federal government could, by inaction, disarm the state militias (and thus deprive the people of the right to bear arms). No one in the First Congress was concerned, however, that federal marshals might go house-to-house taking away muskets and swords from the man on the street or on the farm. Notably, *there is not a single statement in the congressional debate about the proposed amendment that indicates that any congressman contemplated that it would establish an individual right to possess a weapon. See* Rakove, *supra*, at 210-11. Moreover, in other public fora, some of the framers explicitly disparaged the idea of creating an individual right to personal arms. For instance, in a highly influential treatise, John Adams ridiculed the concept of such a right, asserting that the general availability of arms would "demolish every constitution, and lay the laws prostrate, so that liberty

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[50] For instance, Madison resisted Anti-Federalist proposals to place limits on the national army, as well as on the authority of the federal government to call the state militia into federal service. Various amendments related to the national army had been offered, such as to restrict the standing army in peacetime, to require a supermajority for congressional authorizations regarding the federal army, or to impose a numeric limit on the size of any federal army. *See* Yassky, *supra*, at 607. Madison rejected all of them. Anti-Federalists offered dire predictions, particularly regarding the federal power to call forth state militias. They predicted that this power would lead to one state's militia being turned against another's, and that the federal government would force state militias to march to far-flung corners of the nation. *Id.*

can be enjoyed by no man — it is a dissolution of the government." 3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 475 (1787).[51]

Equally important, almost all of the discussion in the First Congress about the proposed amendment related to the conscientious objector provision, which, as we noted earlier, was ultimately removed. *See* 5 THE FOUNDER'S CONSTITUTION 210-12 (Philip B. Kurland & Ralph Lerner, eds., 1987) (minutes of congressional debate). The fact that the overwhelming majority of the debate regarding the proposed Second Amendment related to the conscientious objector provision demonstrates that the congressmen who adopted the amendment understood that it was concerned with the subject of state militias. A right not to bear arms due to conscientious objection can *only* mean a right not to be compelled to carry arms that the government seeks to make one bear — to perform military service that one is unwilling to perform. There is no possible relevance of the term

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[51] We differ with the Fifth Circuit's reading of the historical record in this respect. The *Emerson* court cites a number of general statements, both in the congressional record and outside of it, by "prominent Americans" that the first twelve proposed amendments, ten of which were ratified as the Bill of Rights, relate to individual rights. 270 F.3d at 245-55. It is of course true that the amendments primarily establish individual rights; however, it cannot be disputed that certain portions of the proposed amendments related to other matters. The Tenth Amendment, for instance, relates primarily to the balance of power between the state and federal governments. Additionally, the provision that was recently ratified as the Twenty-Seventh Amendment, but was originally promulgated with the original twelve amendments, relates to Congressional compensation, not individual rights. Thus, we find unconvincing the argument that because some legislators and public figures generally discussed the group of proposed amendments, as establishing individual rights, the Second Amendment establishes a private right to own or possess firearms.

"conscientious objection" to a constitutional amendment guaranteeing a private right to possess firearms. Thus, if the Second Amendment was in fact designed to establish an individual right, the debate over the conscientious objector provision would have been entirely purposeless.[52]

[9] In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as to ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect.

3. Text, History, and Precedent All Support the Collective Rights View of the Amendment.

We reaffirm our earlier adherence to the collective rights interpretation of the Second Amendment, although for reasons somewhat different from those we stated in *Hickman*. *Hickman* rested on a canvass of our sister

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[52] Comments of individual delegates also reveal that those who supported the Second Amendment did so because they sought to protect the people from federal hegemony. For instance, Anti-Federalist Elbridge Gerry of Massachusetts sought elimination of the conscientious objector provision because he was concerned that if it were included in the federal constitution, then Congress, rather than the state legislatures, would define what constituted conscientious objection, and that Congress would thereby have excessive authority over the management of the state militia. Gerry concluded, "if we give a discretionary power [to the federal government] to exclude those from militia duty who have religious scruples, we may as well make no provision on this head." BILL OF RIGHTS, *supra*, at 185. Thus, in Gerry's view, if Congress, through the conscientious objector provision, could control membership in the militia, then there was little point to the Second Amendment at all. *Id.*

circuits and a summary evaluation of *Miller*. *Miller* did not, however, definitively resolve the nature of the right that the Second Amendment establishes. As we observed earlier, the relevant statements in *Miller* are all expressed in negative terms. Although those negative statements rule out the traditional individual rights model, the Court took no specific affirmative position as to what rights the amendment does protect. Thus, our decision regarding the nature of the rights guaranteed by the Second Amendment must be guided by additional factors — the text and structure of the amendment, an examination of the materials reflecting the historical context in which it was adopted, and a review of the deliberations that preceded the enactment of the amendment — considered in a manner that comports with the rationale of *Miller*.

[10] After conducting our analysis of the meaning of the words employed in the amendment's two clauses, and the effect of their relationship to each other, we concluded that the language and structure of the amendment strongly support the collective rights view. The preamble establishes that the amendment's purpose was to ensure the maintenance of effective state militias, and the amendment's operative clause establishes that this objective was to be attained by preserving the right of the people to "bear arms" — to carry weapons in conjunction with their service in the militia. To resolve any remaining uncertainty, we carefully examined the historical circumstances surrounding the adoption of the amendment. Our review of the debates during the Constitutional Convention, the state ratifying conventions, and the First Congress, as well as the other historical materials we have discussed, confirmed what the text strongly suggested: that the amendment was adopted in order to protect the people from the threat of federal tyranny by preserving the right of the states to arm their militias. The proponents of the Second Amendment believed that only if the states retained that power could the existence of effective state militias — in which the people could exercise their right to "bear arms" — be

ensured. The historical record makes it equally plain that the amendment was not adopted in order to afford rights to individuals with respect to private gun ownership or possession. Accordingly, we are persuaded that we were correct in *Hickman* that the collective rights view, rather than the individual rights models, reflects the proper interpretation of the Second Amendment. Thus, we hold that the Second Amendment imposes no limitation on California's ability to enact legislation regulating or prohibiting the possession or use of firearms, including dangerous weapons such as assault weapons. Plaintiffs lack standing to assert a Second Amendment claim, and their challenge to the Assault Weapons Control Act fails.

C. The AWCA's Provisions Regarding Off-Duty Police Officers Do Not Offend The Fourteenth Amendment; However, There Is No Rational Basis For the Retired Officer Exemption.

Plaintiffs contend that the privileges that are afforded to off-duty and retired peace officers under the AWCA violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Specifically, they contend that the pertinent provisions afford benefits to off-duty and retired officers that are unavailable to the plaintiffs, and that there is no rational reason that they and other law-abiding citizens should be treated differently than off-duty and retired peace officers.[53] The

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[53] Plaintiffs have standing to bring these claims because they allege that the challenged provisions to the AWCA afford a benefit to some persons and not to others based on grounds that cannot survive Equal Protection scrutiny. If their arguments are correct, plaintiffs would suffer an equal protection injury. As the Supreme Court has explained:
When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection

district court held that both the off-duty provision and the retired officers exception comport with the requirements of the Equal Protection Clause. We affirm the district court's decision with respect to the off-duty provision, but reverse as to the exception for retired peace officers.

1. The Applicable Standard of Equal Protection Review

When a state statute burdens a fundamental right or targets a suspect class, that statute receives heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Statutes that treat individuals differently based on their race, alienage, or national origin "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1986). Statutes infringing on fundamental rights are subject to the same searching review. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel). However, if a legislative act neither affects the exercise of a fundamental right, nor classifies persons based on protected characteristics, then that statute will be upheld "if the classification drawn by the statute is rationally related to a legitimate state interest." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Here, plaintiffs assert that because their Second Amendment rights are fundamental, any statute allowing some persons to exercise those rights differently from others should be subject to strict scrutiny. Because we conclude in Section B, *supra*, that plaintiffs have no constitutional right to own or possess weapons, heightened scrutiny does not apply. Thus, we apply rational-basis review to

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case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.
Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993).

plaintiffs' claims that the AWCA provisions violate the Equal Protection Clause.

2. General Principles of Rational-Basis Review.

The Supreme Court has observed that the rational-basis test is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions" is primarily a task for legislatures. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Nevertheless, several general principles may be distilled from the several (and sometimes contradictory) cases in which the Supreme Court has applied the test.

First, in order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately. *City of Cleburne*, 473 U.S. at 439; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."); *Dillingham v. INS*, 267 F.3d 996, 1007 (9th Cir. 2001).

Second, when assessing the validity of legislation under the rational-basis test, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 439; *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

Third, there must exist some rational connection between the state's objective for its legislative classification and the means by which it classifies its citizens. Although rational basis review is undoubtedly deferential — indeed, a "paradigm of judicial restraint," *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) — it is nevertheless our duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal. "The search for the link between classification and objective gives substance to the Equal Protection Clause;

it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass . . . ." *Romer*, 517 U.S. at 632; *see also Nordlinger*, 505 U.S. 1, 31 (1992) (Stevens, J., dissenting) ("[D]eference is not abdication and "rational-basis scrutiny" is still scrutiny."); *Peoples' Rights Org. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) ("Rational-basis review, while deferential, is not 'toothless.' " (quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)).

Finally, the burden falls upon the party attacking a legislative classification reviewed under the rational-basis standard to demonstrate that there is no reasonable basis for the challenged distinction. When a statute is reviewed under the rational-basis test, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citation and quotation marks omitted); *see also Lucas*, 427 U.S. at 510. The legislative record need not contain empirical evidence to support the classification so long as the legislative choice is a reasonable one. *Beach Communications*, 508 U.S. at 315; *Nordlinger*, 505 U.S. at 15 ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification.") (citation omitted). Although the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. With these general principles in mind, we turn to the two provisions that plaintiffs challenge under the Equal Protection Clause.

3. The Validity of the Two AWCA Provisions

a. The Off-duty Officer Provision

The appellants' attack on the AWCA provision applicable to off-duty peace officers is easily resolved. It is manifestly rational for at least most categories of peace officers to possess and use firearms more potent than those available to the rest of the populace in order to maintain public safety. The off-duty officer exception provides that an off-duty officer permitted to possess and use the assault weapons must do so only for "law enforcement purposes." § 12280(g). We presume that off-duty officers may find themselves compelled to perform law enforcement functions in various circumstances, and that in addition it may be necessary that they have their weapons readily available. Thus, the provision is designed to further the very objective of preserving the public safety that underlies the AWCA. Consequently, there is a rational basis for the provision, and it comports with the requirements of the Fourteenth Amendment.[54]

b. The Retired Officer Exception

In contrast, the retired officer exception has no such clearly rational basis. The amendments to the AWCA provide that the California agencies listed at note 6, *supra*, may sell or transfer assault weapons to a sworn peace officer upon the retirement of that officer. § 12280(h). The exception does *not* require that the transfer be for law enforcement purposes, and the possession and

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[54] One could question the wisdom of arming certain government officials categorized as "peace officers" by the AWCA — particularly park rangers and employees of the district attorney's office — with highpowered military-style weapons. However, that is not the basis for plaintiffs' challenge to this provision of the AWCA. The question is whether those officers furnished such weapons may use them for law enforcement purposes when off duty. As set forth in the text, inclusion of the limitation that the assault weapons are to be used for law enforcement purposes only renders the provision a rational one.

use of the weapons is not so limited.[55] Initially, we observe that allowing residents of California to obtain assault weapons for purposes unrelated to law enforcement is wholly contrary to the legislature's stated reasons for enacting restrictions on assault weapons. As set forth more fully above, the legislature found that "the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens in this state."[56] When the legislature first passed the AWCA, the entire Assembly, sitting as the Committee of the Whole, heard testimony from the California Attorney General, the chiefs of police of several local jurisdictions, public health experts, and the relatives of crime victims about the devastating effects of assault weapons on California communities. *See* 1 CAL. ASSEMBLY J., at 435-59 (Feb. 13, 1989). In light of the unequivocal nature of the legislative findings, and the content of the legislative record, there is little doubt that any exception to the AWCA unrelated to effective law enforcement is directly contrary to the act's basic purpose of eliminating the availability of high-powered, military-style weapons and thereby protecting the people of California from the scourge of gun violence.[57] *See United States Dep't of Agric.*

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[55] It would appear from the wording of § 12285 that retired peace officers who obtain assault weapons for personal use upon retirement from government service are exempt from the registration and use restrictions of the AWCA. Whether or not they are, however, our conclusion is the same.

[56] California Governor Gray Davis, who signed the 1999 amendments to the AWCA including the retired officer exception, evinced a similar intent through his public statements. In announcing, with great fanfare, his support for the 1999 amendments to the AWCA, he proclaimed that "[t]here is no justification whatsoever for [assault weapons] on the streets of a civilized society." Martha L. Willman, *Davis Backs Bill to Limit Assault Gun Sale and Use Legislation*, L.A. TIMES, Apr. 27, 1999, at B2.

[57] While the grandfather clause may also appear to be inconsistent with this legislative intent, that clause is not

v. Moreno, 413 U.S. 528, 534 (1973) ("The challenged statutory classification . . . is clearly irrelevant to the stated purpose of the Act."). However, our inquiry cannot end here. We must attempt to identify *any* hypothetical rational basis for the exception, whether or not that reason is in the legislative record. *See id.* In response to a request from this court for supplemental briefing on the question of whether there is a rational basis for the retired officer exception, the state offered three justifications for the exception. None is in any way persuasive.

First, the state argues that because a similar exception exists in the federal assault weapons law enacted in 1994, the provision "ostensibly withstood the rational basis test federally." However, the mere existence of the same distinction in a federal statute is not probative evidence that the provision is rational. Although we must presume that the legislative classification challenged in this case has a rational basis, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981), that presumption cannot be bolstered by the fact that the same classification exists in another jurisdiction's statute. An unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity.

Second, the state argues that because some peace officers receive more extensive training regarding the use of firearms than do members of the public, allowing any retired officer to possess assault weapons for non-law enforcement purposes is reasonable. This justification is basically inconsistent with the legislative purpose of the AWCA; it bears no reasonable relationship to the stated legislative purpose of banning the possession and use of assault weapons in California, except for certain law enforcement purposes. The object of the statute is not to ensure that assault weapons are owned by those most

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challenged here. Equally important, the argument that a rational basis for the grandfather clause exists is entirely different from, and likely more substantial than, those put forward to justify the off-duty exception.

skilled in their use; rather, it is to eliminate the availability of the weapons generally. Not only is the retired officers exception contrary to the purpose of the AWCA, its relationship to *any* legitimate state goal "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

The state's third argument fails also. The state contends that the retired officers exception is rational because it allows retiring peace officers to keep their duty weapons, which in some cases the officer may have purchased with his own funds. However, the retired officer provision contains no such limitation; indeed, on its face the statute would permit the transfer of any number of assault weapons to *any* peace officer, regardless of whether that officer had ever come into contact with the weapons being acquired. Indeed, in contrast to the off-duty officer provision, under the retired officers' exception the retiree may possess and use assault weapons for any purpose whatsoever.[58]

We may not complete our evaluation of the statute's validity merely by examining the state's proffered justifications for the law. Rather, we must determine whether *any* reasonable theory could support the legislative classification. *Heller*, 509 U.S. at 320. An exception to the assault weapons law for retired officers might arguably be rational if California required its retired peace officers to participate as reserves in the event of an emergency. However, there is no such requirement in California. Moreover, even if there were such a requirement, a statute that permitted retired peace officers — at their discretion — to obtain assault weapons and use them for unlimited purposes, and in an unregulated manner, would not reasonably advance the objective of establishing a reserve force of retired officers prepared to act in emergencies.

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[58] We need not consider here whether any officers who may have purchased weapons prior to the adoption of the AWCA are covered by its grandfather clause. That issue is not before us.

We thus can discern no legitimate state interest in permitting retired peace officers to possess and use for their personal pleasure military-style weapons. Rather, the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs.

In sum, not only is the retired officers' exception contrary to the legislative goals of the AWCA, it is wholly unconnected to any legitimate state interest. A statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny. The 1999 AWCA amendments include, however, a severability provision providing that should any portion of the statute be found invalid, the balance of the provisions shall remain in force. Accordingly, because the retired officers' exception is an arbitrary classification in violation of the Fourteenth Amendment, we sever that provision, § 12280(h)-(i), from the AWCA.

III. ADDITIONAL CONSTITUTIONAL CLAIMS

Plaintiffs assert three additional constitutional claims that we can dispose of readily. First, Plaintiffs who own assault weapons contend that the AWCA violates the takings clause of the Fifth Amendment because it reduces the value of those weapons. It is well-established, however, that a government may enact regulations pursuant to its broad powers to promote the general welfare that diminish the value of private property, yet do not constitute a taking requiring compensation, so long as a reasonable use of the regulated property exists. *Am. Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 354, 368 (9th Cir. 1981) ("If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains."); *see Andrus v. Allard*, 444 U.S. 51, 66 (1979)("A reduction in the value of property is not necessarily a taking."). Here, plaintiffs who owned assault weapons prior to the enactment of the AWCA are protected by a grandfather clause that permits them to use the weapons in a number of reasonable ways so long

as they register them with the state. In light of the substantial safety risk posed by assault weapons that prompted the passage of the AWCA, any incidental decrease in their value caused by the effect of that act does not constitute a compensable taking. *Am. Sav. & Loan Ass'n*, 653 F.2d at 368.

Second, plaintiffs challenge the registration provisions of the AWCA as violative of their informational privacy rights. Although there does exist an "individual interest in avoiding[government] disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), that right "is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Crawford v. United States Tr.*, 194 F.3d 954, 959 (9th Cir. 1999) (citing *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991)). Here, applying the factors set forth in *Doe*, we conclude that the government's goal in establishing a public registry of those who possess assault weapons is a proper governmental interest, and the plaintiffs' interests in maintaining confidential the fact of their assault weapon ownership are minimal. Accordingly, we affirm the dismissal of this claim.

Finally, plaintiffs contend that the retired and off-duty officer provisions of the statute require association with law enforcement officers in order to obtain the benefits of the provisions. Thus, plaintiffs argue, the statute violates their First Amendment rights. This claim has no merit; even aside from the fact that we have directed that the retired officer provision be severed, the statute plainly requires no person to associate with any other person. The district court therefore correctly dismissed this claim as well.

IV. CONCLUSION

[11] Because the Second Amendment affords only a collective right to own or possess guns or other firearms, the district court's dismissal of plaintiffs' Second Amendment claims is AFFIRMED. Because the off-duty

officer provision is supported by a rational basis, the district court's dismissal of plaintiffs' equal protection claim challenging that provision is also AFFIRMED. However, because no rational basis exists for the retired officers exception, we REVERSE the district court's dismissal of that claim and direct that judgment be entered for the plaintiffs in that regard. The constitutional challenges to the validity of the California Assault Weapons Control Act are all rejected, with the exception of the claim relating to the retired officers provision.
AFFIRMED in part, REVERSED in part, and REMANDED.

MAGILL, Circuit Judge, Special Concurrence:

I join parts I, II-C, and III of the court's opinion. Respectfully, I cannot join parts II-A and II-B, but I do concur in the judgment. Parts II-A and II-B consist of a long analysis involving the merits of the Second Amendment claims and the Ninth Circuit's adoption of the collective rights theory of the Second Amendment. As discussed below, this analysis seems unnecessary.

Article III of the Constitution requires that federal courts adjudicate only actual "cases" or "controversies." *E.g., Allen v. Wright*, 468 U.S. 737, 750 (1984). This requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Id.* Among the doctrines that ensure federal courts only resolve "cases" or "controversies," Article III standing "is perhaps the most important." *Id.* The requirement of Article III standing "aids the federal judiciary to avoid intruding impermissibly upon the powers vested in the executive and legislative branches, by preventing courts from issuing advisory opinions not founded upon the facts of a controversy between truly adverse parties." *Scott v. Pasadena Unified Sch. Dist.*, ___ F.3d ___, ___ (9th Cir. 2002) (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947)). "Article III standing is a jurisdictional prerequisite." *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996). "Without jurisdiction the court cannot proceed at

all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

It is well established that, as a threshold matter, this court must determine whether the plaintiffs have standing to assert their claim. *E.g., Scott*, ___ F.3d at ___, ___ (stating that "[w]e must establish jurisdiction before proceeding to the merits of the case"); *Bird v. Lewis & Clark Coll.*, ___ F.3d ___, ___ (9th Cir. 2002) (recognizing that before reaching the merits of the case, the court must determine the threshold issue of standing); *Hickman*, 81 F.3d at 101 (discussing that the court is "bound to address the standing issue at the threshold of the case"). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of the particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The plaintiffs in this case are simply not entitled to standing and thus I cannot join the court's discussion of the merits of their Second Amendment claims.

Here, the court claims that "[a]lthough in every case we are required to examine standing issues first, . . . here an examination of that question requires us as a first step to conduct a thorough analysis of the scope and purpose of the Second Amendment. Only after determining the amendment's scope and purpose can we answer the question whether individuals, specifically the plaintiffs here, have standing to sue." Maj. Op. at 23-24 n.17 (internal citation omitted). Respectfully, I disagree. Previously, this court decided the scope and purpose of the Second Amendment. We are bound by that precedent.

In *Hickman*, this court announced that the Second Amendment guarantees a collective right, not an individual right. 81 F.3d at 102. As such, this court held that an individual plaintiff lacks standing to enforce the right to keep and bear arms because "the states alone stand in the position to show legal injury when this right

is infringed." *Id.* As recognized by my colleague Judge Reinhardt, we have no power to overrule *Hickman*; only an en banc panel may do so. *See* Maj. Op. at 22 n.15 (citing *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993)). Thus, we are bound by the *Hickman* decision, and resolution of the Second Amendment issue before the court today is simple: plaintiffs lack standing to sue for Second Amendment violations because the Second Amendment guarantees a collective, not an individual, right and thus plaintiffs are unable to establish injury in fact. *See Scott*, ___ F.3d at __ ("In order to establish standing, a plaintiff must first show that she has suffered an 'injury in fact.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted))). Precedent mandates that we affirm the district court's dismissal of these claims for lack of standing. Accordingly, it is unnecessary and improper to reach the merits of the Second Amendment claims or to explore the contours of the Second Amendment debate.

Consequently, I join parts I, II-C, and III of the court's opinion and concur in its judgment that plaintiffs lack standing to challenge the AWCA.

DECISION OF DISTRICT COURT

FILED DEC 13, 2000 CLERK, U.S. DISTRICT COURT
Eastern District of California DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SEAN SILVEIRA; et al., *Plaintiffs*,
v.
BILL LOCKYER, Attorney General, State of California; GRAY DAVIS, Governor, State of California,
Defendants.

NO. CIV. S-00-0411 WBS/JFM
MEMORANDUM AND ORDER

Defendants, Bill Lockyer and Gray Davis move to dismiss plaintiffs' first, third, fourth, sixth, seventh and eighth claims for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiffs' second and fifth claims for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. Facts

On January 1, 2000, Senate Bill 23 became state law as part of California Penal Code section 12280. Pursuant to section 12280, members of the public who, on or before December 31, 1999, lawfully possessed assault weapons, as they are now defined in California Penal Code section 12276.1, have until December 31, 2000, to register their assault weapons with the California Department of Justice, or remove the characteristics which make the firearm an assault weapon. Section 12280 was intended to expand the definition of assault weapons and to place restrictions on the manufacture, sale, possession, and use of the firearms described in the legislation. Section 12280 also bans the sale of large capacity magazines, defined as "any ammunition feeding device" capable of holding more than ten rounds of ammunition, but does not ban the possession of them. Plaintiffs filed this action for three stated purposes, only two of which are relevant to this motion. "First, it is a specific challenge to the current state of the law in the Ninth Circuit holdings. Second, it challenges the constitutionality of the current State of California gun laws." (Opp'n at 4:16—17).

II. Discussion

A. Standards for 12(b) (1) and 12(b) (6)

Where a jurisdictional issue is separable from the merits of a case, the court may determine jurisdiction under rule 12(b)(1). Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). However, where the jurisdiction issue is "dependent on the resolution of factual issues going to the merits," the court may not resolve such disputes before trial. Augustine v. United States, 704 F.2d 1074, 1077

(9th Cir. 1983). Instead, the court must assume that the allegations in the complaint are true, unless controverted by undisputed facts in the record. Roberts, 812 F.2d at 1177.

A district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b) (6). In ruling on a 12(b) (6) motion, the court must view all allegations and draw all inferences in the light most favorable to the non-moving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "A complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

B. Plaintiffs' First Cause of Action

In their first cause of action plaintiffs allege that section 2280 violates their Second Amendment right to bear arms "by virtue of its incorporation into the State Constitution and by virtue of the Fourteenth Amendment." Plaintiffs' claim fails for two reasons. First, the Ninth Circuit has clearly held that the Second Amendment does not constrain the states by virtue of the Fourteenth Amendment. See Fresno Rifle & Pistol Club, Inc. v. Van De Ramp, 965 F.2d 723, 729—31 (9th dr. 1992); see also Hickman v. Block, 81 F.3d 98, 103, n.10 (9th Cir. 1996). Second, following precedent from the United States Supreme Court in United States v. Miller, 307 U.S. 174 (1939), the Ninth Circuit has also clearly held that the Second Amendment guarantees a collective right of the states to maintain armed militia rather than an individual right. Hickman, 81 F.3d at 102. Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their first cause of action must be dismissed.

C. Plaintiffs' Second Cause of Action

Plaintiffs allege in their second cause of action that "their property is now devalued since they are unable to obtain the highest value that their property would be worth in an

open and free market." (Am. Compl. 91 85). The amended complaint further alleges that the plaintiffs' property has "now been rendered worthless." (Id.) Plaintiffs claim this is a deprivation of the use and enjoyment of their property without due process of law, in violation of their rights under the Fifth and Fourteenth Amendments. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

The Ninth Circuit addressed the converse of this argument in San Diego County Gun Rights Committee v. Reno, 98 F.3d 1121 (9th Cir. 1996). The plaintiffs in that case, who claimed to be potential purchasers of firearms, argued that the price of banned firearms increased as much as 100% when the federal government enacted the Crime Control Act. at 1130. Plaintiffs here, presumably potential sellers, argue that their weapons have been "rendered worthless." However, the standing analysis is the same: failure to prove an economic injury that is traceable to the government's action results in a lack of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Because plaintiffs' alleged economic injury occurred in a market environment, they cannot trace their injury to any action taken by the government. See San Diego County, 98 F.3d at 1130, citing Common Cause v. Department of Energy, 702 F.2d 245, 251 (D.C. Cir. 1983) ("{W]here injury is alleged to occur within a market context, the concepts of causation and redressability become particularly nebulous and subject to contradictory, and frequently unprovable analyses."). Furthermore, any decrease in the value of the identified assault weapons will be the result of third party action by dealers or manufacturers. San Diego County, 98 F.3d at 1130.

Accordingly, because plaintiffs do not have Article III standing, this court lacks subject matter jurisdiction and their second claim must be dismissed. Id.; see also Lujan, 504 U.S. at 560.

D. Plaintiffs' Third Cause of Action

Plaintiffs allege in their third cause of action that section

12280 violates their substantive due process rights under the Fourteenth Amendment because it infringes on their individual right to possess firearms. (Am. Compl. ¶ 91). Plaintiffs claim their individual right to possess firearms is a "liberty interest imbedded in both the Second Amendment and Fourteenth Amendment . . . ." Id. Plaintiffs further claim that section 12280 infringes on that interest because the "highly technical" and obscure statute criminalizes conduct that is not "inherently evil," thus creating the possibility that individuals will be held accountable for unknowingly violating the law. (Am. Compl. ¶¶ 91—97).

Liberty interests protected by the Due Process Clause are limited to the specific freedoms found in the Bill of Rights and those precisely described by the Supreme Court. See Washington v. Glucksberg, 521 U.S. 702, 719—20 (1997) Therefore, in order to allege a protected liberty interest, the plaintiffs must be able to point to either a freedom identified in the Bill of Rights or one of the liberty interests identified by the Supreme Court. Id. At 720—22. Plaintiffs specify the Second Amendment as the basis for their alleged liberty interest in individually possessing firearms. As discussed above, the Second Amendment contains no such guarantee. See Hickman, 81 F.3d at 101. Not surprisingly, neither has the Supreme Court ever identified an individual's right to possess firearms as a protected liberty interest under the Fourteenth Amendment. It is not for this court to expand the definition of "liberty" to include a right which is found neither in the Bill of Rights nor in the concrete examples deliberately supplied by the Supreme Court. See Glucksberg, 521 U.S. at 722.[59]

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[59] Even if plaintiffs had alleged a protected liberty interest, their third cause of action would still fail. Plaintiffs seem to suggest that the holding in Lambert v. California, 355 U.S. 225 (1997), should be read as a determination by the Supreme Court that statutes prohibiting otherwise lawful conduct are unconstitutional because individuals will not be

Accordingly, plaintiffs cannot prove any set of facts whereby relief can be granted, and their third cause of action must be dismissed.

E. Plaintiffs' Fourth Cause of Action

Plaintiffs' fourth cause of action alleges that section 12280 violates the Equal Protection Clause of the Fourteenth Amendment because it allows peace officers, whether on duty, off duty, or retired, to possess assault weapons.[60] (Am. Compl. 9191 103-106.)

Section 12280 contains a classification on its face because it provides an exemption for law enforcement officials.[61] However, the exemption is not based on an

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"on notice" that they are breaking the law. (Am. Compl. ¶91 91-97). Plaintiffs' reliance on Lambert is misguided. The Supreme Court found the statute in Lambert unconstitutional because it did not contain an element of intent. See Lambert, 355 U.S. at 226. Section 12280, as interpreted by the California Supreme Court, does contain an element of intent. See In re Jorge N., 23 Cal. 4th 866 (2000) ("... the People must prove, that is, that a defendant charged with possessing an unregistered assault weapon knew or reasonably should have known the characteristics of the weapon bringing it within the registration requirements ...." Therefore, the narrow holding of Lambert is inapposite. Furthermore, the Supreme Court has carefully limited the application of Lambert. See Texaco v. Short, 454 U.S. 516, 537 n.33 (1982). The Fifth Circuit has noted the Supreme Court's reticence to read Lambert too broadly, for fear the unique case would "swallow the general rule that ignorance of the law is no excuse." United States v. Giles, 640 F.2d 621, 628 (5th Cir. Unit A, 1981).

[60] The fourth cause of action also appears to allege a claim based on the Privileges and Immunities Clause of "Article I, Section 8 of the California Constitution." (Am. Compl. 91 21 106). However, "[t]o state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States." American Mfrs. Nut. Ins. Co., v. Sullivan, 526 U.S. 40, 49 (1999).

[61] Section 12280(f) states: "Subdivisions (a) and (b) shall not apply to the sale to, purchase by, or possession of assault

inherently suspect classification such as race or national origin, nor does it involve a fundamental right. See Hickman, 81 E.3d at 101 (finding that the Second Amendment "does not protect the possession of a weapon by a private citizen"); see also San Diego County, 98 F.3d at 1125 (finding that the Ninth Amendment does not encompass "a fundamental, individual right to bear firearms"). Thus, to prevail on their equal protection claim, plaintiffs must show that section 12280 is not rationally related to a legitimate government purpose. See National Association for the Advancement of Psychoanalysis v. California 3d. of Psychology, 228 F.3d 1043, 1049 (9th dir. 2000) (the court applies rational basis review unless the statute involves an inherently suspect classification or interferes with a fundamental right).

The court may properly consider the rational basis of a challenged statute on a motion to dismiss pursuant to Rule 12(b)(6). Aleman v. Glickman, 217 F.3d 1191, 1200 (9th Cir. 2000) (applying rational basis test in reviewing and affirming dismissal for failure to state a claim). In reviewing a statute to determine whether it has a rational basis, the court examines whether the statute is "rationally related to a legitimate state interest." California 3d. of Psychology, 228 F.3d at 1049. "[A] statutory classification . . . must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Id. at 1201 (quoting F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993).). The law does not "require that the government's action actually

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weapons by the Department of Justice, police departments, sheriffs' offices, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Came, Department of Parks and Recreation, or the military or naval forces of this state or of the United States for use in the discharge of their official duties." Cal. Penal Code § 12280(f).

advance its stated purposes, but merely [looks] to see whether the government could have had a legitimate reason for acting as it did." Id. (quoting Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1999).

The regulation of firearms under section 12280 is within the State's police power, which is "one of the most essential[,] . . . and always one of the least limitable of the powers of government." District of Columbia v. Alice Brooke, 214 U.S. 138, 149 (1909); see United States v. Lopez, 514 U.S. 548, 567 (1995) (concluding that to allow federal regulation of firearms possession in local school zones would be "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"). In accordance with this power, a State has a legitimate interest in restricting the possession of certain assault weapons. See Cal. Penal Code §12276 (defining assault weapons as "semiautomatic firearms" and providing a list of restricted weapons). Conversely, the State must insure that its peace officers are sufficiently armed to enforce the law. Thus, it is not merely "conceivable," but undeniable that the exemptions for law enforcement officers in section 12280 are rationally related to the government's duty to preserve the peace.

Plaintiffs argue that the exemption is over-inclusive because it includes off—duty and retired peace officers. However, it is not inconceivable that off duty police officers, or even retired ones, may be called upon to perform law enforcement functions which ordinary citizens may not be expected to perform. In performing those kinds of functions, it is not unreasonable for the legislature to allow those off duty or retired officers access to weapons which they would not want in the hands of the general civilian populace. "[L]egislatures are given leeway under rational-basis review to engage in such line drawing." Taylor v. Rancho Santa Barbara, 206 F.3d 932, 936 (9th Cir. 2000). This court cannot conclude that the Legislature's decision to categorically exempt "sworn peace [officers]" from the prohibitions of section 12280

was irrational. Cal. Penal Code § 12280(f)—(i); cf. Autotronic Systems, Inc. v. C'Oeur D'Alene, 527 F.2d 106 at 108 (9th Cir. 1975) (declining to second guess the Legislature's actions). Accordingly, plaintiffs cannot prove any set of facts whereby they could sustain a claim for relief, and their fourth cause of action must be dismissed.

F. Plaintiffs' Fifth Cause of Action

Plaintiffs' fifth cause of action alleges a violation of equal protection on the ground that "Sheriffs and State Law Enforcement officials are currently issuing concealed weapons permits on a discriminatory basis." (Am. Compl. 91 112). In addition, plaintiffs appear to allege that a separate statute, California Penal Code section 12031(b), violates equal protection because it exempts law enforcement officials from restrictions against the carrying of loaded firearms and allows them to obtain Carry Concealed Weapon permits ("CCW") without showing "good cause."[62] The court lacks subject matter jurisdiction over the fifth cause of action because there are no facts that would lead one to believe that plaintiffs have tried and failed to obtain a CCW. Moreover, defendants are not even the persons authorized to issue CCWs. See Cal. Penal Code § 12050 (a) (1) (A)-(B) (providing that the county sheriff or the chief of a municipal police

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[62] Plaintiffs specifically allege that section 12031 allows law enforcement officials to obtain concealed weapons permits without showing good cause, while civilians must show good cause to obtain a permit under section 12050. Section 12050 provides that persons applying for a license to carry a concealed weapon must show "good moral character" and "good cause." Cal. Penal Code § 12050(a).

The language of Penal Code section 12031 provides: "(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street Cal. Penal Code § 12031 (a) (1). Section 12031(b) states that subdivision (a) shall not apply to peace officers, whether active or honorably retired. Cal. Penal Code § 12031(b).

department may issue a CCW).To meet the case-or-controversy requirement of Article III of the United States Constitution, "a litigant must have 'standing' to invoke the power of a federal court." Hickman, 81 F.3d at 101 (9th Cir. 1996) ("Article III standing is a jurisdictional prerequisite."). A plaintiff has standing under Article III if (1) he has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. See Lujan, 504 U.S. at 560-561. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 560. In their fifth cause of action, plaintiffs generally allege injury as a result of "the loss of use and enjoyment of constitutional rights." (Am. Compl. ¶ 122). However, plaintiffs allege no facts suggesting either a present or imminent injury as a result of conduct by defendants. As a result, plaintiffs do not have standing to raise an equal protection claim against defendants for the alleged discriminatory issuance of CCWs or to challenge the statutory requirements for obtaining a CCW. Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their fifth cause of action must be dismissed.

C. Plaintiffs' Sixth Cause of Action

Plaintiffs allege in their sixth cause of action that section 12280 violates their right to privacy under the United States and California constitutions because the mandatory registration provision will allow the general public access to their private information,[63] and it will allow the government to "spy on them." (Am. Compl. ¶¶ 165-166).

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[63] Plaintiffs cite Gov't Code Section 6250 et seq., which provides that members of the public may access information contained within the Department of Justice. Therefore, because section 12280 mandates registration of assault weapons with the Department of Justice, the public will have access to the information that these individuals own assault weapons.

There is no express right of privacy found in the United States Constitution. Rather, the constitutional right to privacy has been identified by the Supreme Court in discrete areas of conduct, falling within the "penumbra" of privacy rights that radiate from the Fourteenth Amendment. See Griswold v. Connecticut, 381 U.S. 479 (1965). The Ninth Circuit recognizes two distinct kinds of constitutionally protected privacy interests in Supreme Court precedent: (1) "... the individual interest in avoiding disclosure of personal matters," (2) "the interest in independence in making certain kinds of important decisions." Crawford v. United States Trustee, 194 F.3d 954, 958 (9th Cir. 1999).

Plaintiffs appear to argue that the mandatory registration of firearms violates the first type of constitutionally protected privacy interest, "informational privacy." Because the right to informational privacy is not an absolute right, plaintiffs must establish that their interest in keeping private their possession of assault weapons outweighs the government's interest in maintaining and properly disclosing information regarding the same. Id.

The court considers the following factors, among others, when weighing plaintiffs' interest in keeping private the information that plaintiffs own assault weapons, against the government's interest in regulating firearms:

the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there's an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Crawford, 194 F.3d at 959 (citing Doe v. Attorney General, 941 F.2d 780, 796 (9th Cir. 1991).

The Ninth Circuit found the government's prevention of fraud through dissemination of individual social security numbers, names and addresses, was not outweighed by

an individual's right to keep that information private. Crawford, 194 F.3d at 960. The court found the government's interest in preventing crime outweighed the potential for identity fraud alleged by the plaintiffs. Id. Certainly ownership of an assault weapon is not more personal than an individual's social security number, name and address.

Plaintiffs cite no authority to support their proposition that public access to information regarding their ownership of assault weapons will violate their constitutional right to informational privacy. Further, plaintiffs have not alleged any facts to suggest a potential for harm, should the public obtain the information contained in the registry. On the other hand, the government has a recognized and legitimate interest in regulating firearms. Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their sixth cause of action must be dismissed.[64]

H. Plaintiffs' Seventh Cause of Action

Plaintiffs allege in their seventh cause of action that section 12280 violates their First Amendment right to freedom of association because it forces plaintiffs "to become associated with a group of individuals employed by the government if they want to receive the same perks and advantages as others so situated." (Opp'n at 35:20)

In Besig v. Dolphin Boating & Swimming Club, 683 F.2d 1271, 1276 (9th dir. 1982), the Ninth Circuit held that a statute, which by its express language neither forbids nor mandates association with any individual or group does not violate the First Amendment right to freedom of association nor its correlative right not to

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[64] Assuming this court had jurisdiction to determine their challenges to the state constitution, plaintiffs' additional allegation that section 12280 violates their right to privacy under the California Constitution also fails. The California Supreme Court has clearly identified the regulation of firearms, including their registration, to be a proper police function. Galvan v. Superior Court, 70 Cal.2d 851, 866 (1969).

associate. Plaintiffs' assertion in this case that they will be "forced" to associate with peace officers is not based on express, mandatory language in the statute.

Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their seventh cause of action must be dismissed.

I. Plaintiffs' Eighth Cause of Action

In their eighth cause of action, plaintiffs allege that section 12280 violates their natural right to keep and bear arms pursuant to the Ninth and Fourteenth Amendments. Again, plaintiffs are advancing an argument that the Ninth Circuit has already summarily rejected.

First, the Ninth Amendment is not an independent source of constitutional rights. Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991). The Ninth Amendment has been interpreted to contain no rights at all, but to be simply a guide for reading the Constitution. Id. (citing Laurence H. Tribe, American Constitutional Law 776 n.14 (2d ed. 1988).).

Second, the Ninth Circuit has unequivocally held that the Ninth Amendment "does not encompass an unenumerated, fundamental, individual right" to possess a firearm. San Diego County, 98 F.3d at 1125. Consequently, plaintiffs have no legal basis for their claim. Accordingly, plaintiffs cannot prove any set of facts whereby they can sustain a claim for relief, and their eighth cause of action must be dismissed.

IT IS THEREFORE ORDERED defendants' motion be, and the same hereby is, GRANTED. Plaintiff's first, second, third, fourth, fifth, sixth, seventh and eighth claims are hereby DISMISSED without leave to amend. DATED: December 12, 2000.

WILLIAM B. SHUBB - USDJ

No. 03-051

Supreme Court, U.S.
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In The
Supreme Court of the United States

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K. MEHL, SGT. STEVEN FOCHT, SGT. DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD,

Petitioners,

v.

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it denied Petitioners' standing to challenge a California state statute in federal court based upon the unincorporated Second Amendment to the United States Constitution?

2. Whether the Second and Fourteenth Amendments operate to deprive the states of the ability to take reasonable measures pursuant to the state legislatures' police powers to protect their citizens from the ravages of rampant gun crimes?

   A. Whether *Presser v. Illinois,* 116 U.S. 252 (1886), a seminal case upon which states rights to control firearms has been predicated for over one hundred years should be overruled?

   B. Whether the Second Amendment should be held to be part of the Fourteenth Amendment privileges and immunities of citizens and the precedent which has existed for more than one hundred and twenty years as established by *United States v. Cruikshank*, 92 U.S. 542 (1876) and the *Slaughterhouse Cases*, 83 U.S. 36 (1873), overruled?

3. Whether a fourth precedential case from this Honorable Court, *United States v. Miller*, 307 U.S. 174 (1939), which upheld the conviction of an individual who violated a federal gun control law, should be overruled?

QUESTIONS PRESENTED – Continued

4. Whether a heightened standard of review should be applied to a State statute that provides for reasonable control of firearms should be imposed if the Court overrules at least four of its previous cases and more than one hundred and twenty years of precedent?

5. Whether a trial on the merits, and a record of expert and factual testimony should be developed concerning the Second Amendment and the specific firearms and factual issues involved in this case?

6. Whether this Court should order an interim assessment of litigation expenses and counsel fees for Petitioners prior to the establishment of the trial and compilation of the expert and factual testimony proposed in question V?

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OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals (Pet. App., pp. 40A-109A) is reported at 312 F.3d 1052. The statement (Pet. App., pp. 1A-40A) issued by the panel upon denial of rehearing en banc is reported at 328 F.3d 567.

STATEMENT OF JURISDICTION

The amended judgment of the Court of Appeals was entered on January 27, 2003. A petition for rehearing en banc was denied on May 6, 2003. The petition for a writ of certiorari was filed on July 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioners are a group of self-described "model" citizens from the State of California who seek an advisory opinion concerning their abstract right under the Second Amendment to possess assault weapons free from state regulation. Petition, p. 2 n. 3. Petitioners' complaint below (included with this Brief in Opposition as an Appendix) presents a sweeping and vague "shotgun" approach to attacking a variety of California's gun control statutes. Among other things, petitioners attack the assault weapons laws and concealed-carry laws for handguns; complain about laws regulating "'Saturday Night Special' ('Junk Guns')" handguns, and "cop-killer" bullet laws; and raise nebulous due process "takings" claims.

The Ninth Circuit Court of Appeals denied petitioners their desired advisory opinion for lack of standing, on the

ground that the Second Amendment does not create an individual right to possess firearms for personal use. The opinion's elaborate analysis was, therefore, patently unnecessary; the court's holding was a foregone conclusion in view of its earlier decision in *Hickman v. Block*, 81 F.3d 101-102 (9th Cir. 1996), *cert. denied*, 519 U.S. 912 (1996). See Pet. App., p. 59A n. 15. Although the panel's analysis was different from others', nevertheless the result – refusing to entertain a challenge to state regulation of assault weapons based on an asserted individual right to possess them – was consistent with this Court's own precedent and with the decisions of all other circuit courts that have considered the question.

STATEMENT OF THE CASE

At issue in this case is a State's regulation of the possession and sale of assault weapons, rapid-fire rifles and pistols that have been used on California's school grounds to kill children. Pet. App., p. 42A. This case is not about militias, nor even about collective defense. Petitioners have never contended for the need to possess their assault weapons in the interest of collective defense. This case is about petitioners' asserted right to possess these extremely lethal weapons for personal use – free from state regulation.

Petitioners challenge the 1999 amendments to California's Roberti-Roos Assault Weapons Control Act. The original assault weapons control laws were passed fourteen years ago, in 1989. Cal. Penal Code sec. 12276 et seq. Enactment of the 1989 law followed years of extensive public discussion and legislative debate regarding the

propriety of gun control laws in California. In section 12275.5 of the Roberti-Roos Assault Weapons Control Act, California Penal Code section 12275.5, the Legislature memorialized its reasons for regulating assault weapons:

> The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities.

The Roberti-Roos Assault Weapons Control Act of 1989 withstood federal constitutional scrutiny, including an attack made pursuant to the Second Amendment, in *Fresno Rifle and Pistol Club v. Van de Kamp*, 965 F.2d 723 (9th Cir. 1992). In that case, the Ninth Circuit also found the plaintiffs did not have standing to challenge pursuant to the Second Amendment.

In 1999 the California Legislature made additions to the 1989 assault weapons laws, modeled on federal law, 18 U.S.C. §§ 921(a)(30) and 922(v)(1). The amendments were

designed to expand the definition of assault weapons and to place restrictions on the manufacture, sale, possession, and use of the firearms that have the specified characteristics. The amendments also banned the sale, but not the possession, of large-capacity magazines, which were defined as "any ammunition feeding device" capable of holding more than ten rounds of ammunition. See Cal. Pen. Code § 12276.1(d)(1), (2).

The 1999 amendments became effective on January 1, 2000. Members of the public who, on or before December 31, 1999, lawfully possessed assault weapons as defined in California Penal Code section 12276.1, had until December 31, 2000, to register their assault weapons with the California Department of Justice, or remove the characteristics which make the firearm an assault weapon. Pursuant to California Penal Code section 12286, individuals may obtain, upon a showing of good cause, a permit from the California Department of Justice to purchase, sell, or possess an assault weapon.

Petitioners are residents of California, apparently not otherwise prohibited by law from possessing firearms, who allegedly own or wish to acquire assault weapons. They include an engineer, an insurance agent, a law enforcement officer, members of the California National Guard and veterans of the United States Armed Forces. Petitioners moved the district court to invalidate the 1999 amendments. The district court dismissed the petitioners' action and the Ninth Circuit Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

I. THE OPINION OF THE COURT OF APPEALS IN THE PRESENT CASE DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT.

For more than 120 years, this Court has repeatedly held that the Second Amendment does not apply to state laws. See *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."); *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886) ("But a conclusive answer to the contention that this [Second] amendment prohibits the [state] legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government and not upon the States."). Indeed, since the Second Amendment was designed to ensure the States' ability to thwart invasion and protect against federal encroachment, it would be especially ironic to include it among the provisions selectively incorporated against state power.

More than 60 years ago, the Court in *United States v. Miller*, 307 U.S. 174 (1939), again addressed the scope of the Second Amendment in a challenge to the National Firearms Act of 1934. The Court reasoned that, in order to sustain the challenge, the firearm at issue must have "some reasonable relationship to the preservation or efficiency of a well regulated militia," and without such evidence there existed no Second Amendment "right to keep and bear" a sawed-off, or short-barrel shotgun. *Miller*, 307 U.S. at 178. The Court determined the purpose of the Second Amendment was "to assure the continuation and render possible the effectiveness" of militia forces and

emphasized the Second Amendment must "be interpreted and applied" in a manner that focuses on the militia. *Ibid.*

The Court has never deviated from these precedents recognizing the essential connection between the Second Amendment and collective defense by state militias. For example, in *Lewis v. United States*, 445 U.S. 55, 65, n. 8 (1980), the Court cited *Miller* favorably in determining that legislative firearm restrictions "are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." See also, e.g., *Adams v. Williams*, 407 U.S. 143, 150-151 (1972) (Douglas, J. dissenting) (quoting *Miller* for the proposition that the Second Amendment "must 'be interpreted and applied' with the view of maintaining a militia"). Moreover, the Court has reviewed firearm regulations without addressing the Second Amendment at all. See e.g., *United States v. Bean*, 537 U.S. 71 (2002); *United States v. Lopez*, 514 U.S. 549 (1995). Furthermore, this Court has denied review in numerous cases raising individual-right challenges under the Second Amendment. See Robert J. Spitzer, *The Second Amendment "Right to Bear Arms" and United States v. Emerson*, 77 St. John's L. Rev. 1, 14 (2003).

II. THERE IS NO CIRCUIT CONFLICT WITH RESPECT TO THE QUESTION WHETHER A STATE-LAW REGULATION OF ASSAULT WEAPONS IMPLICATES AN INDIVIDUAL RIGHT UNDER THE SECOND AMENDMENT.

The opinion of the Ninth Circuit panel below was a gratuitous elaboration of theory to support a holding that was, in any event, dictated by the same court's precedent

some seven years earlier. See Pet. App., pp. 108A-109A (Magill, J., concurring); *Hickman v. Block*, 81 F.3d 101-102 (9th Cir. 1996), *cert. denied* 519 U.S. 912 (1996). Indeed Congress, the Courts of Appeals, and state legislatures have all heavily relied upon the fact that this Court has never upheld an individual's Second Amendment challenge on any grounds. Federal courts interpreting the scope and meaning of the Second Amendment to the United States Constitution have, with the sole exception of the Fifth Circuit in dicta (see discussion infra p. 9), have consistently concluded that the Second Amendment does not create an individual, personal right to keep and bear arms, but rather the right of the States to maintain a "well regulated militia." *United States v. Miller*, 307 U.S. at 178 (1939); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) (Second Amendment not violated since there was no evidence the defendant "was or ever had been a member of any military organization or that his use of the weapon . . . was in preparation for a military career" and he was "on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia."); *United States v. Rybar*, 103 F.3d 273, 286 (3rd Cir. 1996) (Second Amendment not implicated as defendant's possession of a machine gun was not connected with militia activity); *Love v. Pepersack*, 47 F.3d 120, 122-124 (4th Cir. 1995) ("[T]he Second Amendment does not apply to the states," and "the Second Amendment preserves a collective, rather than individual, right."); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) ("'since the Second Amendment right "to keep and bear arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm'"), quoting *Stevens v.*

United States, 440 F.2d 144, 149 (6th Cir. 1971); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (Second Amendment right "inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia"); *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) ("[C]onsidering this history, we cannot conclude that the Second Amendment protects the individual possession of military weapons."); *Hickman v. Block*, 81 F.3d at 101-102 (9th Cir. 1996), *cert. denied* 519 U.S. 912 (1996) ("We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen. We conclude that Hickman can show no legal injury, and therefore lacks standing."); *Fresno Rifle Club v. Van de Kamp*, 965 F.2d 723, at 729-731 (9th Cir. 1992); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) (rejecting individual rights view and rejecting defendant's claim that his possession of a machine gun was protected by the Second Amendment); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997) (Second Amendment provided no individual protection for defendant who unlawfully possessed machine guns); see also cases listed in "Federal Constitutional Right to Bear Arms," 37 A.L.R.Fed. 696 and Supp. (1978); *Galvan v. Superior Court of the City and County of San Francisco*, 70 Cal.2d 851, 866 (1969) ("The claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question.").

Nor is there any genuine conflict between the Ninth Circuit's decision below and the decision of the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert denied*, 536 U.S. 907 (2002). In *Emerson*, the

court upheld the constitutionality of a challenged federal gun control statute. Dr. Emerson had been the subject of a Texas state trial court restraining order which forbade him from threatening his wife or children (domestic violence restraining order). *Emerson,* 270 F.3d at 211-12. Dr. Emerson was found in possession of a Beretta 9mm pistol and indicted by a federal grand jury pursuant to 18 U.S.C. § 922(g)(8). *Ibid.* Dr. Emerson moved to dismiss the indictment, asserting that the statute, facially and as applied to him, violated his individual, personal right to keep and bear arms as guaranteed by the Second Amendment. Although the court of appeals reached the conclusion that the Second Amendment is an individual right, it did so in dicta: "[B]ecause of our holding that section 922(g)(8), as applied to Emerson, does not infringe his individual rights under the Second Amendment we will not now further elaborate as to the exact scope of all Second Amendment rights." *Emerson*, 270 F.3d at 260.

Furthermore, both the Fifth and the Ninth Circuits have, despite their differing analytical approaches, refused to disturb reasonable gun-control measures. Despite its reasoning that the right to keep and bear arms is an individual right, the *Emerson* court agreed that even such a right is subject to legitimate public safety and police power considerations. It is well settled by this Court that regulation of firearms is a proper police function that does not violate Second Amendment axioms. *Lewis v. United States*, 445 U.S. 55, 65-66 (1980) (gun law prompted by Congress' concern for the easy availability of firearms and threat to community peace); *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897) (the right to keep and bear arms "is not infringed by laws prohibiting the carrying of concealed weapons").

Accordingly, the purported conflict between the Ninth and the Fifth Circuits posed by *Emerson* is, in fact, illusory. As the Solicitor General pointed out in his brief in Opposition to the Petition for Certiorari in *Emerson*: "Petitioner identifies no case, and the government is aware of none, in which a court of appeals has found Section 922(g)(8) – or for that matter, any other federal statutory restriction on private gun possession – to be violative of the Second Amendment . . . But while the courts of appeals are in disagreement concerning the abstract question whether the [Second] Amendment protects an individual right to bear arms for reasons unrelated to militia service, no circuit conflict exists on the constitutionality of any firearms prohibition contained within 18 U.S.C. 922." Brief for the United States in Opposition, *Emerson v. United States*, No. 01-8780, pp. 19-20. Nor is their any circuit conflict on the constitutionality of a state-law regulation of assault weapon possession and sale.

This case involves state efforts to regulate assault weapons. In the absence of any circuit conflict over the rights of states to do so, prudence dictates that this Court stay its hand.

III. PETITIONERS SEEK AN ADVISORY OPINION FROM THE COURT, AND THE PRESENT CASE DOES NOT PRESENT ISSUES THAT ARE SUFFICIENTLY DEVELOPED FOR CONSIDERATION BY THE COURT. AND THOSE ISSUES, EVEN IF RESOLVED, WILL NOT PROVIDE A MEANINGFUL REMEDY FOR PETITIONERS.

Petitioners candidly admit in their petition for certiorari that they are only seeking an advisory opinion from

the Court and that the present case presents only an abstract question:

> The nature, extent, and constitutional deficiencies of any *specific* restrictions on the right to keep and bear arms in this case should first be argued in depth and determined at trial on remand after guidance from this Court, and full expert and lay testimony. This petition does not present specific questions on the details of those complex Second Amendment issues. It squarely raises only the core Second/Fourteenth Amendment right to keep and bear arms issues, as well as the important need for a heightened standard of review of any infringements on this express fundamental right.

Petition, p. 2 n. 3 (italics in original).

It is unclear from the petition and the complaint whether or not it is necessary to reach the constitutional questions, since petitioners have only vaguely referenced the weapons at issue and the firearms statutes being challenged. This Court has long recognized "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions." *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938). "[B]efore . . . questions of constitutional law, both novel and of far-reaching importance, [are] passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)).

In petitioners' first amended complaint, they state "Plaintiffs would like to exercise their rights to possess,

carry and conceal firearms, subject to *reasonable* restrictions, such as mandatory background checks and appropriate classes demonstrating proficiency in the safe use of firearms for protection and sport." See Resp. App., p. 10, ¶ 32 (emphasis in original). It is evident that petitioners concede that some public and peace-officer safety concerns are legitimate in the context of the Second Amendment. While petitioners evidently object to registration of firearms, they are, somewhat inconsistently, willing to submit to a background check – which uses a registry to determine one's eligibility to possess firearms. See Resp. App., p. 10, ¶ 32; p. 5, ¶ 9; p. 26, ¶¶ 125-26.

The scope of the questions any jury would be asked to determine is ambiguous, at best. Petitioners make vague reference that, "[a]s a direct and proximate result of the herein [unspecified] acts, omissions, and systematic deficiencies, policies and customs of all and/or part of Defendants, Plaintiffs have been harmed according to proof." See Resp. App., p. 14, ¶ 53. On the record as it currently stands, it would be a Herculean undertaking for a jury to determine "the harm" to petitioners, given the breadth and ambiguity of the allegations in the complaint.

Petitioners have never stated what, if any, assault weapons they own, nor have they explained why they could not register their weapons. They have not alleged that they attempted to obtain a permit to purchase, sell, or possess an assault weapon, and were rejected a permit for some reason which violates federal constitutional principles. Petitioners have not explained why they simply cannot remove the characteristics from their assault weapons, if indeed they possess the inappropriate firearms.

Furthermore, petitioners' complaint challenges broadly a wide variety of California's firearms control statutes. According to the petition and the complaint, at trial the jury would be expected to review each and every one of these statutes in light of this Court's advisory opinion. In addition to the previously discussed amendments to the Roberti-Roos assault weapons law, petitioners attack California's "Saturday Night Special" law, Resp. App., p. 6, ¶¶ 14-15; "Safe Handgun" law, *id.*, p. 16. ¶ 61; "large capacity magazine" law, *id.* p. 17, ¶ 68; and "Concealed Carry" law, *id.* pp. 24-26, ¶¶ 109-22. Petitioners also demand jury trial on issues that the aforementioned laws infringe their "Right to Privacy," Resp. App., pp. 26-27, ¶¶ 124-30; right to "Freedom of Association," *id.*, pp. 27-28, ¶¶ 131-36; "Due Process" rights, *id.* pp. 19-20, ¶¶ 82-89; "Liberty Interests," *id.* pp. 20-22, ¶¶ 90-100; "Equal Protection Rights," *id.* pp. 22-23, ¶¶ 101-07; and rights assertedly guaranteed by the "9th and 14th Amendments," *id.*, pp. 28-29, ¶¶ 137-43.

Finally, even if petitioners were to prevail before this Court, they will still not be free from regulation of their assault weapons. Petitioners will still be subject to virtually identical federal assault weapons restrictions under 18 U.S.C. §§ 921(a)(30), 922 Appendix, as enforced through 18 U.S.C. § 922(v)(1). Indeed, a far more effective challenge for the purpose of determining the parameters of any government's ability to limit petitioners' asserted individual Second Amendment rights would be a challenge to the *federal* assault weapons control laws.

This Court has emphasized that it "will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984); *Parker v. County of Los Angeles*,

338 U.S. 327, 333 (1949); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Such a premature circumstance is presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: October 20, 2003

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT IN AND FOR THE EASTERN DISTRICT OF CALIFORNIA

SEAN SILVERIA; JACK SAFFORD; PATRICK OVERSTREET; DAVID K. MEHL; SGT. STEVEN FOCHT; SGT. DAVID BLALOCK; MARCUS DAVIS; VANCE BOYCE; KEN DEWALD. Plaintiffs,	CASE NO.: CIV S 00411 WBS/JFM **FIRST AMENDED COMPLAINT FOR:** 1) 42 U.S.C. § 1983 (Second and Fourteenth Amendment – unconstitutional firearms statute)

vs.

BILL LOCKYER Attorney General, State of California; GRAY DAVIS, Governor, State of California.

Defendants.

2) 42 U.S.C. § 1983 (Fifth and Fourteenth Amendment-deprivation of property without due process)

3) 42 U.S.C. § 1983 (Fifth and Fourteenth Amendment-Liberty Interest)

4) 42 U.S.C. § 1983 (Fourteenth Amendment-Equal Protection – Assault Weapons owned by retired and off duty Law Enforcement officers)

5) 42 U.S.C. § 1983 (Fourteenth Amendment – Equal Protection – CCW)

6) 42 U.S.C. § 1983 (Fifth and Fourteenth Amendment – Right to Privacy – Gun Registration)

7) 42 U.S.C. § 1983 (First and Fourteenth Amendment – Freedom of Association)

8) 42 U.S.C. § 1983 (Ninth and Fourteenth Amendment – Right to Keep and Bear Arms – keeping and bearing arms is a natural right

) which pre-existed the
) rights enumerated in
) the Constitution)
)
) **DEMAND FOR JURY TRIAL**
) **[F.R.C.P. 38(b)]**
)
) REQUEST FOR
) PRELIMINARY
) INJUNCTION
)
) NOTICE OF
) UNCONSTITUTIONALITY
) OF STATE STATUTE
)

(Filed Jul. 24, 2000)

INTRODUCTION

1. "This year will go down in history. For the first time a civilized nation has full gun registration! Our streets will be safer, our police more efficient, and the world will follow our lead into the future." *Adolph Hitler*, 1935. These plans went into affect again in 2000 when the new California firearm registration law took affect.

2. "I ask, sir, what is the militia? It is the whole people . . . to disarm the people is the best and most effectual way to enslave them." *George Mason*, during Virginia's ratification convention (1788).

3. "No free man shall ever be debarred the use of arms." Thomas Jefferson.

4. This case challenges the Constitutionality of California's so called "Assault Weapons" law, and other nuisance firearms legislation.

5. "God grants liberty only to those who love it, and are always ready to guard and defend it." *Daniel Webster*, speech, June 3, 1834.

THE UNDERLYING FACTS

6. Since about half of U.S. households have a gun, broadly directed restrictions on the acquisition, possession, and use of guns impinge on the lives and liberties of millions of Americans and Californians, not just a small, politically powerless subset of them.

7. In response to this simple fact, the advocates of more restrictive controls have directed their focus away from measures which result in either an all out ban or regulation of all types of guns; as such, current gun laws are targeted toward those which regulate special subtypes of firearms, i.e. types of guns which are owned by smaller numbers of voters and which are consequently more vulnerable to regulation.

8. For instance, "if I could have gotten 51 votes in the Senate of the United States for an out-right ban, picking up every one of them . . . 'Mr. and Mrs. America, turn 'em all in,' I would have done it. I could not do that. The votes weren't here." Senator Dianne Feinstein: CBS-TV's "60 Minutes", February 5, 1995, "Semi-automatic assault weapons are turning America's streets into war zones. True, ***they are not responsible for a large number of homicides***, but what they do is offer the possibility. . ." [*emphasis added*] Senator Dianne Feinstein: Congressional Record, November 9, 1993. In fact, the actual number is statistically insignificant that DOJ and the FBI do not even maintain statistics on alleged assault weapons."

9. California's laws have thus increasingly stressed the need to control various special weapon categories such as "assault rifles" and "Saturday Night Special" ("Junk Guns") handguns, and "cop-killer" bullets, or sometimes all handguns. For each weapon or ammunition type, it is argued that the object is especially dangerous or particularly useful for criminal purposes, while having little or no counterbalancing utility for lawful purposes. A common slogan is "This type of gun is good for only one purpose – killing people."

10. The specific weapon type so described shifts from one year to the next, in response to shifts in the political winds rather than actual criminologically significant shifts in criminal use of guns. For example, the so-called "cop killer bullets" which were restricted in 1986, have never killed a cop.

11. "Assault rifles" and "assault weapons" became important objects of gun control efforts in the 1980s.

12. Contrary to widespread claims, these semi-automatic "military-style" weapons are rarely used by criminals in general or by drug dealers or juvenile gang members in particular, are almost never used to kill police officers, are generally *less lethal than ordinary hunting rifles*, and are not easily converted to fully automatic fire. They do offer a rate of fire somewhat higher than other gun types and can be used with magazines holding large numbers of cartridges, but there is **absolutely no evidence** demonstrating that so called "assault weapons" are relevant to the outcome of any significant number of gun crimes. *Guns and Violence: A Summary of the Field*, Gary Kleck, Ph.D., School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

13. In fact, fewer than 2% of gun homicides involve the military-style semiautomatic weapons which are commonly labeled "assault weapons." *Guns and Violence: A Summary of the Field*, Gary Kleck, Ph.D., School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

14. Saturday Night Specials (SNSs) or "Junk Guns" are small, cheap handguns. The U.S. Bureau of Alcohol, Tobacco and Firearms (BATF) definition of SNSs is a barrel length under three inches, .32 caliber or less, and price under $50 in mid-1970's dollars. *California changed this definition dramatically by defining a SNS as any handgun lacking a "manually operated safety."* Thus, California has redefined BATF's criteria of a SNS.

15. Considering the obvious target of California's SNS gun law (i.e. Glock's and Sig's), SNSs are not the real target of the policies, but rather that all handguns are. Given the obscure and technical definitions that are actually used in legislation and administrative regulations in California, it was easy to manipulate such a definition in a politically low-profile way such that most handguns fell within the SNS category.

16. Each year about 1,500-2,800 criminals are lawfully killed by gun-wielding American civilians in justifiable or excusable homicides, *far more than are killed by police officers*. There are 600,000-1 million defensive uses of guns each year, significantly more than the number of crimes committed with guns.

17. About a third of U.S. households keep a gun at least partially for defensive reasons; at any one time nearly a third of gun owners have a firearm in their home (usually a handgun) which is loaded; about a quarter of

retail businesses have a gun on the premises; and approximately 5% of U.S. adults (including celebrities, politicians, judges, and off-duty and retired law enforcement personnel) regularly carry a gun for self-defense.

18. According to the State of California, center for Health Statistics and department of Justice, in 1997, out of 3,849 firearm/explosives deaths [DHS fails to identify the actual number of deaths caused by the use of firearms versus explosives] in California, ***1,727 were suicides*** and 175 were accidental; thus, approximately half were inflicted by another person; however, out of this number, 93% of the deaths were caused by handguns, not so called "assault weapons." DOJ's own records reflect that between 1990 to 1998, 10% were coded justifiable home shootings, and 5% were justificable police shootings. Thus, a minimum of 15% of the homicides were justifiable, leaving only approximately **1,500 homicides**. In fact, this Homicide rate is in fact declining. See Plaintiff's Exhibit "A" attached.

19. This is a mere pittance when compared to the number of people killed in 1997 by auto accidents [**3,809** (Plaintiff's Exhibit "B" attached.)], or by ingesting too much alcohol all at once [**3,345** (Plaintiff's Exhibit "C" attached.)].

20. Firearm Mortality (All figures are for U.S.) – Annual Firearm Deaths from Homicide have ranged from approximately 12,000 in 1976 to a peak of approximately 17,000 in 1993. In 1998, they have reached an all time low of 10,900. Handguns are used in a majority of the homicides. In 1998, 2,160 were from all other guns, other than handguns.

21. Age-Adjusted Death Rate: 12.2 deaths per 100,000 population (1997) Death Rate for Males Ages 15-24; 38.9 deaths per 100,000 population (1997) **Death Rate for Black Males Ages 15-24: 119.9 deaths per 100,000 population** (1997) Firearm suicide deaths: 6.6 per 100,000 population (1997) Fire Homicide Deaths: 5.1 per 100,000 population (1997). Source: National Vital Statistics Reports, Vol. 47, No. 19.

22. In 1997, there were 3,319 alcohol induced deaths in California out of 19,576 Alcohol-induced deaths in the United States, not including motor vehicle fatalities. In 1997, there were 25,175 deaths in the United States from Chronic Liver Disease and Cirrhosis. [All statistical information compiled from CDC and DHS.]

23. State Health Director Kim Belshé announced that the majority of Californians – 82 percent – do not smoke. *Secondhand smoke is the third leading cause of preventable death* in this country, killing 53,000 nonsmokers in the U.S. each year. In the largest study ever conducted on the issue, Harvard Medical School found that a high exposure to secondhand smoke nearly doubles a woman's risk of having a heart attack.

24. Over **400,000 people die** each year from the physiological effects of **tobacco** alone. California being the most with **43,000 annually**. .

25. Even though firearms are responsible for a fraction of all deaths and is steadily declining, and alcohol and tobacco are the leading causes of death as they are responsible for over half of all deaths in the United States. See Plaintiffs' exhibit "D." Thus, the Defendants are enforcing gun laws that lack any *rationale basis*. It is apparent that if Defendants' were concerned about saving

lives, they would enforce legislation which would ban alcohol and tobacco products, thus eliminating half of all deaths. As such, it defies reason as to why guns are specifically targeted and declared a "public nuisance," especially in light of this County's history regarding the right to keep and bear arms in defense of self and liberty.

26. As such, this is a claim for retrospective and/or prospective relief, as well as monetary damages, if applicable.

JURISDICTION

27. Jurisdiction conferred on this court by 28 U.S.C. §§ 1331 and 1343 which provides for original jurisdiction of this court and all actions authorized by 42 U.S.C. § 1983. Supplemental Jurisdiction is founded upon 28 U.S.C. § 1367.

VENUE

28. The unlawful actions alleged herein have taken place within the jurisdiction of the United States District Court for the Eastern District of California. The illegal acts took place in Sacramento County, California. Venue is proper under 20 U.S.C. § 1391(b).

ATTORNEYS FEES

29. Plaintiffs are entitled to attorney's fees pursuant to 42 U.S.C. § 1988, and as private attorney generals.

PARTIES

30. At all relevant times mentioned herein, Plaintiffs JACK SAFFORD; SEAN SILVEIRA; PATRICK OVERSTREET; DAVID K. MEHL; STEVEN FOCHT; MARCUS DAVIS; VANCE BOYCE; and KEN DEWALD, (hereinafter "Plaintiffs" unless otherwise noted), are at all times herein mentioned, adult male United States citizens and residents of California.

31. Plaintiffs own, or would like to own, semi-automatic rifles and/or pistols subject to the terms of the statute which prohibits and/or restricts possession, use, transfer and/or sale of semi-automatic rifles and/or pistols.

32. Plaintiffs' would like to exercise their right to possess, carry and conceal firearms, subject to ***reasonable*** restrictions, such as mandatory background checks and appropriates classes demonstrating proficiency in the safe use of firearms for protection and sport.

33. Plaintiff JACK SAFFORD is a resident of Corning, California, husband and father, and owns substantial acreage/farm land. He owns his own insurance agency and is a model citizen. He is a graduate of California State University, Chico.

34. Plaintiff SEAN SILVEIRA is a resident of Marin County, California, husband and father of two, and owns real property in Marin. He is a civil engineer, model citizen, and a graduate of California State University, Chico.

35. Plaintiff PATRICK OVERSTREET is a resident of Marin County, California, husband, and owns real property in Marin. He is employed by the San Francisco

Police Department as a S.W.A.T. officer, and a graduate of California State University, San Diego.

36. Plaintiff DAVID K. MEHL is a resident of Sacramento, California, husband, and owns real property in Sacramento. He is a chemical engineer, graduate of the University of California, Davis, and a model citizen.

37. Plaintiff SGT. STEVEN FOCHT is a resident of Placer County, husband and father, and owns real property in Placer County. He was a Marine Corp sniper who performed military functions in Desert Storm, Rwanda, Ethiopia, Kenya, Thailand, in addition to Mogadishu, Somalia. He was honorably discharged, and currently a Sergeant in the California Army National Guard. He is a model citizen.

38. Plaintiff SGT. DAVID BLALOCK is a resident of Sacramento County and owns real property in Sacramento County. He was assigned to the 82nd Airborne Division who is a Purple Heart recipient from combat injuries (AK 47 round through his arm) occurring in the Noriega police operation (invasion of Panama) and currently a Sergeant in the California Army National Guard. He is a model citizen.

39. Plaintiff MARCUS DAVIS is a resident of Sacramento, California, husband and expecting father, and real property owner. He is mortgage broker, graduate of the University of California, Davis, and a model citizen.

40. Plaintiff VANCE BOYCE is a resident of Colusa, California, husband and father, and real property owner. He is a [graduate] of California State University, Fresno.

41. Plaintiff KEN DEWALD is a resident of Paradise, California, husband and father, and real property

owner. He was honorably discharged from the Air Force, and is currently employed as a California Correctional Officer and a model citizen.

42. Defendant GRAY DAVIS is the Governor of the State of California, and holds those powers specifically granted to him by virtue of his office and the State constitution.

43. Article V, Section 1, of the California Constitution describes the responsibilities of the Governor with the following words: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed."

44. Defendant BILL LOCKYER was elected as California's 30th Attorney General in November of 1998 and began his term in January of 1999. The Attorney General is the Chief Law Officer of the State of California and is elected and charged by the State constitution with the responsibility to ensure that State laws are uniformly and adequately enforced.

45. Article V, Section 13, of the California Constitution describes the responsibilities of the Attorney General with the following words: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their representative offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their

respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office."

46. The Attorney General represents the people of California before trial, appellate, and Supreme Courts of California and the United States in criminal and civil matters; serves as legal counsel to State officers, boards, commissions, and departments; and assists district attorneys in the administration of justice.

47. Section 11042 of the Government Code requires state agencies to employ only the Attorney General, with few exceptions, as legal counsel to centralize legal work done on behalf of the State. Section 11041 lists those agencies that can represent themselves.

48. It is the responsibility of the Attorney General to assist city, county, state, federal, and international criminal justice agencies to ensure the uniformity and adequacy of enforcement of California State laws.

49. To support California's local law enforcement community, the Attorney General coordinates State-wide law enforcement efforts, participates in criminal investigations, provides forensic science services, and provides identification and information services and telecommunication support.

50. At all relevant times mentioned herein, Defendants are public officials subject to the limitations as set forth in the United States Constitution and the laws of the United States of America, including, but not limited to, the Second, Fourth, Fifth and Fourteenth Amendments.

51. Defendants, and each of them, were policy makers and ratified and/or supplemented the conduct of the other named defendants, and were in a position of power to enforce the laws of the United States of America, and uphold the Constitution.

52. Defendants were, at all times herein mentioned, legally responsible for the acts of their employees, agents, and servants committed in the scope of their employment.

53. As a direct and proximate result of the herein acts, omissions, and systematic deficiencies, policies and customs of all and/or part of Defendants, Plaintiffs have been harmed according to proof.

BACKGROUND INFORMATION

54. As a result of the passage of Senate Bill (SB) 23 (Chapter 129, Statutes of 1999), effective January 1, 2000 any person who, within the state of California, possesses any of the firearms identified in 12276 and other firearms described 12276.1 all euphemistically described as "assault weapon," except as provided in Penal Code section 12276 et seq., (original Roberti-Roos Assault Weapons Control Act), is guilty of a criminal offense. The original Roberti-Roos Assault Weapons Control Act, which was partially unconstitutional, has been supplemented by SB 23 to define assault weapons by their physical characteristics and functionality, rather than just by make and model.

55. Assault Weapons as defined under the original Roberti-Roos Assault Weapons Control Act are not allowed registration under this legislation. The passage of SB 23 also prohibits, except as provided, the manufacture, import, sale, giving or lending of large capacity magazines (defined as any ammunition feeding device with the capacity to accept more than 10 rounds, but not to include .22 caliber tube ammunition feeding devices) effective January 1, 2000.

56. Enforcement relative to the illegal possession of assault weaons will go into effect January 1, 2001, following the one-year registration period. Persons who lawfully possessed assault weapons prior to January 1, 2000 are required to either 1) register them with the Department of Justice between January 1, 2000 and December 31, 2000, 2) render them permanently inoperable, 3) remove them from California, 4) relinquish them to a police or sheriff's department, or 5) sell them to a California licensed firearms dealer who possesses a valid assault weapon dealer permit.

57. However, these prohibitions do not apply to off-duty or retired California peace officers.

58. In addition, citizens who associate with certain Government officials, and off-duty or retired California peace officers are entitled to carry concealed weapons.

59. Article I, Section 8 of the California Constitution provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

60. Though the Roberti-Roos Assault Weapon Control Act of 1989 was augmented with the current

legislation, these acts cumulatively infringe upon Plaintiffs' rights guaranteed by the Second Amendment, and rights retained by the People.

61. In addition, Penal Code Section 12125 et seq. prohibits the manufacture, sale, importation, use, possession, use and/or lending of any handgun failing to satisfy the enumerated requirements, including among other things, handguns lacking a "manually operated safety." This means that Sig Saur's, Glock's and other very expensive and well engineered handguns are now on the prohibited list.

62. In addition, magazines for both long arms and pistols exceeding ten rounds are now prohibited, in certain circumstances. However, the sale or purchase of these magazines is now currently prohibited by law as well.

63. "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." Second Amendment of the United States Constitution.

64. "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." Article III, Section 1 of the California Constitution.

FIRST CAUSE OF ACTION
42 U.S.C. § 1983
(Second and Fourteenth Amendments)

65. Plaintiffs incorporate by reference paragraphs 1 through 64 as though the same were set forth herein at length.

66. Plaintiffs are now prohibited from arming themselves with standard firearms under California law.

67. California law criminalizes firearms with certain, arbitrary characteristics.

68. California law criminalizes certain firearm components, i.e. magazines with a capacity of more than 10 rounds.

69. California law requires registration of firearms.

70. Such registration is the equivalent of registering rights, such as speech.

71. Plaintiffs are prohibited from keeping and bearing arms, including concealed weapons.

72. The Second Amendment is part of the Bill of Rights of the United States Constitution, and is thereby directly applicable to all the states.

73. In addition thereto, the United States constitution, including the Bill of Rights, has been declared to be "the supreme law of the land." Art. III, Sect. Cal. Const.

74. The Second Amendment, by virtue of its incorporation into the State constitution and by virtue of the Fourteenth Amendment, prohibits government officials from enforcing laws which would interfere with an "**individual's**" right to "***keep and bear*** arms."

75. Defendants, acting under color of law, are engaging in conduct that infringes on Plaintiffs' rights guaranteed and protected by the Second Amendment.

76. Defendants' acts include, but are not limited to,

(a) enforcing numerous statutes which infringe upon Plaintiffs' rights which are guaranteed by the Second Amendment,

(b) requiring Plaintiffs to register firearms, and making noncompliance with registration a criminal act,

(c) regulating and controlling firearms and their accessories in a way which obviously infringes upon Plaintiffs' rights of acquisition, ownership, possession, and to keep and bear arms,

(d) depriving Plaintiffs of their individual rights to protect themselves, property and their country.

77. In addition, the California Constitution, Article I, Section 1 specifically provides that "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

78. But by virtue of the current firearms laws, Plaintiffs' ability to exercise those rights have been infringed.

79. In essence, the result of Defendants enforcement of California statutes, Plaintiffs are precluded from being able to exercise those inalienable rights, except in very limited circumstances.

80. As a direct and proximate result, if Defendants are not enjoined from enforcing the subject laws, Plaintiffs will be irreparably harmed according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

81. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

SECOND CLAUSE OF ACTION
42 U.S.C. § 1983
(Plaintiffs)
(DUE PROCESS)

82. Plaintiffs incorporate by reference paragraphs 1 through 81 as though the same were set forth herein at length.

83. Plaintiffs (excluding Sgt. BLALOCK) own firearms (property) and/or magazines which were legal to buy and sell under prior law.

84. After the subject law was passed, Plaintiffs wanted to sell their firearms and magazines. However, they are now prohibited by law, and are likewise precluded from entering into such a transaction.

85. As such, Plaintiffs' property is now devalued since they are unable to obtain the highest value that their property would be worth in an open and free market. In essence, Plaintiffs' property has now been rendered worthless.

86. As a direct and proximate result, Plaintiffs are being deprived their constitutional rights under color of law.

87. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not

limited to the loss of use and enjoyment of constitutional rights and property.

88. As a direct and proximate result, Plaintiffs are being deprived their constitutional rights under color of law.

89. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

THIRD CAUSE OF ACTION
42 U.S.C. § 1983
(Plaintiffs)
(DUE PROCESS – Liberty Interest)

90. Plaintiffs incorporate by reference paragraphs 1 through 90 as though the same were set forth herein at length.

91. Firearm possession is a valuable liberty interest imbedded in both the Second Amendment and Fourteenth Amendment to the United States Constitution. "[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 511 U.S. 600, 610 (1994). Thus, Plaintiffs have a protected liberty interest in firearm possession under the Fifth Amendment.

92. "It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful. This is one of the bedrock principles of American law. It lies at the heart of any civilized system of law." *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir.1998) (Posner, C.J.,

dissenting). It offends both substantive and procedural due process for Plaintiffs to be subjected to criminal prosecution for laws criminalizing past behavior. Because current gun laws retroactively apply and are obscure criminal provisions, it is unfair to hold Plaintiffs accountable for their otherwise previous lawful actions.

93. The conduct these statutes criminalize is malum prohibitum, not malum in se. In other words, there was nothing inherently evil about Plaintiffs possessing certain firearms and accessories. Plaintiffs conduct is and will become unlawful merely because the statutes mandated that it be. See *Wilson* 159 F.3d at 294 (Posner, C.J., dissenting).

94. The subject gun laws are also one of those "highly technical statutes that present . . . the danger of ensnaring individuals engaged in apparently innocent conduct." of which the Supreme Court spoke in *Bryan v. United States*, 524 U.S. 184, 118 S.Ct. 1939, 1946-47, 141 L.Ed.2d 197 (1998).

95. In this case, numerous individuals in California will become criminals for lawful activities committed in the past since the state does not notify each individual firearm owner of the supposed duty to register guns and parts. See *Lambert v. California*, 355 U.S. 225 (1957).

96. Because current gun laws are obscure, highly technical statutes with no mens rea requirement, it violates Plaintiffs' Fifth Amendment due process rights to be subject to prosecution without proof of knowledge that they were violating the statutes.

97. As a direct and proximate result, Plaintiffs are being deprived their constitutional rights under color of law.

98. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights and property.

99. As a direct and proximate result, Plaintiffs are being deprived their constitutional rights under color of law.

100. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

FOURTH CAUSE OF ACTION
42 U.S.C. § 1983
(Equal Protection – Assault Weapons owned by off-duty and retired Law Enforcement officers)

101. Plaintiffs incorporate by reference paragraphs 1 through 100 as though the same were set forth herein at length.

102. The current so called "Assault Weapons" ban does not apply to off-duty and retired California Peace Officers. In other words, this class of citizens are granted privileges and immunities which are not granted to others.

103. This exemption was implemented to facilitate and enlist law enforcement officers to back the current gun legislation. It is a well known fact that *off-duty and retired* law enforcement officers, as a group, are the one of

the biggest purchasers of Assault Weapons, Rifles, and Semi-Automatic pistols, and that these purchases are unrelated to any law enforcement function they may undertake or have undertaken.

104. This exemption serves no legitimate law enforcement interest. For instance, why does an off-duty or retired officer need an AK-47 as no law enforcement agency in California uses them?

105. Plaintiffs are entitled to equal rights, protections and privileges under the law. However, a class of citizens are given rights simply because they happen to be associated with law enforcement.

106. Article I, Section 8 of the California Constitution provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." In this case, off-duty and retired California Peace Officers are " . . . granted privileges or immunities not granted on the same terms to all citizens."

107. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

FIFTH CAUSE OF ACTION
42 U.S.C. § 1983
(Plaintiffs, except Overstreet)
(Equal Protection – CCW)

108. Plaintiffs incorporate by reference paragraphs 1 through 106 as though the same were set forth herein at length.

109. For any citizen of "good moral character" and who has necessary firearms training, is still not entitled to obtain a concealed weapons permit, nor are they permitted to carry a loaded firearm within an incorporated area.

110. Instead, they must first apply to the local sheriff or police chief for a permit.

111. These permits are issued only to individuals with are politically affiliated with the issuing authority, made campaign contributions, or are socially related. In other words, they are used as a powerful tool to be exploited as rewards for those in power.

112. Sheriffs' and State Law Enforcement officials are currently issuing concealed weapons permits on a discriminatory basis. That is they are issued to campaign contributors and political supporters of the issuing authority.

113. In addition, police officers and retired police officers, including federal officers, obtain their concealed weapons authorization under a separate statute, which does not demand a showing of good cause. See Cal. Penal Code S 12031(b).

114. In other words, 12031(b) grants to *"active or honorably retired"* law enforcement officers preferential access to concealed weapons permits due to their *current or former* affiliation to the law enforcement community.

115. Though the stated reason is to protect California Peace Officers from possible harm due to their high involvement in crime, other professions carry the same or higher risk, military personnel subject to terrorist attacks

and protests, doctors employed at abortion clinics, attorney's dealing with disgruntled litigants and inmates, and so forth.

116. There is no rationale basis for this statute as a young black male in California under the age of 25 has a exceedingly far greater chance of being murdered than all peace officers combined throughout the entire United States.

117. Non-law enforcement citizens of good moral character and who adequate training and experience in the use of firearms (i.e. hunters, military, etc.) are not granted the same privilege. Therefore, the law has no rationale purpose other than not to disrupt law endorsements support of the current firearms laws.

118. If defendants enforced the same gun laws against law enforcement officers, the current gun laws would never have been passed as they would have been opposed by law enforcement.

119. Currently, any California resident can purchase a so-called "assault weapon" or carry a concealed weapon simply by becoming a member of a law enforcement agency.

120. Plaintiffs are entitled to equal rights, protections and privileges under the law. However, peace officers are given rights simply because they happen to be associated with law enforcement. Enforcement of such laws violates Plaintiffs' equal protection and association rights.

121. Article I, Section 8 of the California Constitution provides that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

122. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

SIXTH CAUSE OF ACTION
42 U.S.C. § 1983
(All Plaintiffs)
(Privacy)

123. Plaintiffs incorporate by reference paragraphs 1 through 121 as though the same were set forth herein at length.

124. Under both the State and United States Constitution, Plaintiffs have the right to privacy as to the type of property they own, i.e. firearms.

125. Government Code Section § 6250 *et seq.* provides that members of the public may access information contained withing the Department of Justice, inclusive of gun registration information. Government Code Section 6254(f) only excludes certain records regarding ongoing criminal investigations and witness information. Otherwise, any member of the public may access the name, address and the type of property owned by Plaintiffs if they were to register their firearms as required by the statute.

126. In addition, the Gun registration laws allow government to spy on its citizens who are involved in legal activities, i.e. owning personal property, without any legitimate law enforcement interest at stake.

127. Furthermore, Plaintiffs' have a right to privacy in the protection of their homes and property.

128. The current gun laws will deprive Plaintiffs' of their lawful right to defend their persons in the sanctity of their own homes against intrusion by unlawful conduct undertaken by any person, including government officials. [History has shown over and over what can happen to a person in their own home when they are unarmed – see Plaintiffs' Exhibit "E" as just one example as to how a single intruder *with a knife* killed a father and three children, and severely injuring his wife as she ran from her own home because she could not defend herself against the stronger intruder.]

129. Why should government or the public be allowed to know what firearms Plaintiffs own, it to dictate what type of firearm Plaintiffs are allowed to use in defense of their person and home?

130. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

SEVENTH CAUSE OF ACTION
42 U.S.C. § 1983
(Freedom of Association)

131. Plaintiffs incorporate by reference paragraphs 1 through 130 as though the same were set forth herein at length.

132. The current gun laws permits the head of a law enforcement agency to dictate as to which Peace Officer may keep an "Assault Weapon" during their employment, or after they retire or quit.

133. If citizens (Plaintiffs) of California refuse to become part of an association known as "peace officer" or "agent of the Government," or to support a particular "politician," "Sheriff" or "Chief," then they are not granted the rights, privileges, immunities, and equal protections afforded to those who wish to associate with Government or elected officials.

134. Or, if citizens (Plaintiffs) of California refuse to become politically active in support of particular law enforcement officials, they are denied the firearm privileges bestowed upon those who care to associate with such political/governmental figures.

135. In other words, since Plaintiffs refuse to associate with law enforcement or those politically associated with law enforcement, they are denied equal protection of the laws, and privileges and immunities.

136. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

EIGHTH CAUSE OF ACTION
42 U.S.C. § 1983
(Plaintiffs)
(9th and 14th Amendments)

137. Plaintiffs incorporate by reference paragraphs 1 through 137 as though the same were set forth herein at length.

138. Though, *as held by the Ninth Circuit*, the right to keep and bear arms is a state right, the Ninth Amendment of the U.S. Constitution specifically provides that the

rights of the people, though not expressly enumerated, are nevertheless entitled to protection.

139. The Ninth Amendment is directly applicable to Plaintiffs since "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." Article III, Section 1 of the California Constitution.

140. In this case, this country has a long and established history of "the people" keeping and bearing military arms; keeping and bearing arms is a natural right which pre-existed the rights enumerated in the constitution.

141. The right to keep and bear arms is a natural right that every law abiding citizen posses, this right can never be restricted or taken away by Government.

142. Defendants have infringed upon Plaintiffs' natural right to possess, bear and keep firearms. As a direct and proximate result, Plaintiffs have been damaged according to proof, including, but not limited to the loss of use and enjoyment of constitutional rights.

143. "God grants liberty only to those who love it, and are always ready to guard and defend it." *Daniel Webster*, speech, June 3, 1834.

WHEREFORE, Plaintiffs demand judgment against the Defendants, jointly and severally, including but not limited to:

1. For general damages in a sum to be determined.
2. For special damages in a sum to be determined.
3. For attorney fees and costs.

4. For issuance of a preliminary and permanent injunction, including, but not limited to, prohibiting further enforcement of any act or law in violation of Plaintiffs' constitutional rights.

DATED: July 24, 2000

Respectfully submitted,
LAW OFFICES OF
GARY W. GORSKI

/s/ Gary W. Gorski
GARY W. GORSKI,
Attorney for Plaintiffs

PLAINTIFF'S EXHIBIT A

Center for Health Statistics
Death Records

DEATHS BY AGE OF DECEDENT
AGE OF DECEDENT: ALL
RACE/ETHNICITY[1]: ALL
GENDER: ALL
CAUSES OF DEATH: INJURY BY FIREARMS E922, E955.0-955.4, E965.0-965.4, E970, E985.0-985.4
PLACE OF OCCURRENCE: CALIFORNIA
YEAR OF EVENT: 1997

AGE OF DECEDENT	NUMBER OF DEATHS	PERCENT[2]
<1	2	0.1%
1-4	15	0.4%
5-14	55	1.4%
15-24	1,124	29.2%
25-34	871	22.6%
35-44	616	16.0%
45-54	416	10.8%
55-64	242	6.3%
65-74	235	6.1%
75-84	189	4.9%
85+	76	2.0%
unknown	8	0.2%
TOTAL	3,849	100.0%

[1] *White, Black and Other exclude Hispanic ethnicity. Hispanic includes any race category. Other includes Asian, Pacific Islander and American Indian. Other non-Asian, not stated, and unknown are included in White race category.*

[2] *Percents are rounded independently and may not add to total.*

Source: Department of Health Services, Death Records.

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Center for Health Statistics
Death Records

DEATHS BY AGE OF DECEDENT
AGE OF DECEDENT: ALL
RACE/ETHNICITY[1]: ALL
GENDER: ALL
CAUSES OF DEATH: SUICIDE – FIREARMS/EXPLOSIVES E955
PLACE OF OCCURRENCE: CALIFORNIA
YEAR OF EVENT: 1997

AGE OF DECEDENT	NUMBER OF DEATHS	PERCENT[2]
5-14	6	0.3%
15-24	227	13.1%
25-34	273	15.8%
35-44	302	17.5%
45-54	275	15.9%
55-64	186	10.8%
65-74	209	12.1%
75-84	175	10.1%
85+	72	4.2%
unknown	2	0.1%
TOTAL	1,727	100.0%

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[1] *White, Black and Other exclude Hispanic ethnicity. Hispanic includes any race category. Other includes Asian, Pacific Islander and American Indian. Other non-Asian, not stated, and unknown are included in White race category.*

[2] *Percents are rounded independently and may not add to total.*

Source: Department of Health Services, Death Records.

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Center for Health Statistics
Death Records

DEATHS BY AGE OF DECEDENT
AGE OF DECEDENT: ALL
RACE/ETHNICITY[1]: ALL
GENDER: ALL
CAUSES OF DEATH: HOMICIDE – FIREARMS/EXPLOSIVES E965
PLACE OF OCCURRENCE: CALIFORNIA
YEAR OF EVENT: 1997

AGE OF DECEDENT	NUMBER OF DEATHS	PERCENT[2]
<1	2	0.1%
1-4	14	0.7%
5-14	43	2.2%
15-24	844	43.1%
25-34	554	28.3%
35-44	290	14.8%
45-54	127	6.5%
55-64	48	2.5%
65-74	19	1.0%
75-84	8	0.4%
85+	3	0.2%
unknown	4	0.2%
TOTAL	1,956	100.0%

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[1] *White, Black and Other exclude Hispanic ethnicity. Hispanic includes any race category. Other includes Asian, Pacific Islander and American Indian. Other non-Asian, not stated, and unknown are included in White race category.*

[2] *Percents are rounded independently and may not add to total.*

Source: Department of Health Services, Death Records.

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[LOGO]

Highlights from the "Advance Report: California Vital Statistics, 1998"

- California and United States Comparisons
- California's Births
- California's Deaths
- California's Infant Deaths
- How to Order the "Advance Report: California Vital Statistics, 1998"
- Go to Last Year's Highlights

California and United States Comparisons

For the year 1998:

California's estimated population* was 33,494,000, an increase of 1.6 percent (537,000 persons) over the state's 1997 population. California's population comprises 12.4 percent of the United States population, or roughly one of every eight residents.

California's 521,265 live births represented 13.2 percent of the preliminary count of all live births in the U.S., or roughly one of every eight births. California's birth rate (15.6) continued to exceed the preliminary U.S. birth rate (14.6).

California's 225,450 deaths comprised 9.6 percent of all the preliminary deaths in the U.S., or roughly one of every ten deaths. California's death rate (6.7) continued to fall below the preliminary U.S. death rate (8.7).

California's infant death rate of 5.7 per 1,000 live births was lower than the preliminary rate for the United States (7.2).

California's Births

The number of live births to California residents decreased for the eighth consecutive year, dropping from 524,174 in 1997 to 521,265 in 1998 (-0.6 percent).

California's birth rate in 1998 was 15.6 births per 1,000 population, a decrease of 1.9 percent from the 1997 birth rate of 15.9.

California's birth rate decreased in 1998 compared to 1997 for mothers ages under 15-24 and increased for mothers ages 25-44.

In 1998, Hispanics had the largest number (247,796) and highest percentage (47.5 percent) of births among California's race/ethnic groups.

California's Deaths

The number of deaths to California residents increased 0.9 percent from 223,438 in 1997 to 225,450 in 1998.

California's death rate in 1998 (6.7 deaths per 1,000 population) decreased by 1.5 percent from the 1997 rate.

The three most prevalent causes of death were heart disease, malignant neoplasms, and cerebrovascular disease, which together accounted for 60.6 percent of all deaths in California in 1998.

Death rates decreased in 1998 for seven of the ten leading causes of death and increased for three. The largest percentage decrease in the death rate was in homicides, which decreased by 19.0 percent. The largest percentage increase was in pneumonia and influenza (6.7 percent).

In 1998, California's death rates were lower for females than for males in all age groups. Death rates for California's females decreased between 1997 and 1998 in all age groups with the exception of the age group 5-14. For California's males, death rates went down in all age groups.

California's Infant Deaths

There were 2,994 California infants under the age of one year who died in 1998, a decrease of 97 infant deaths (-3.1 percent) from 1997.

California's 1998 infant death rate was the lowest ever recorded, 5.7 infant deaths per 1,000 live births. This was a decrease of 3.4 percent from 1997.

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*Population Estimates for California Counties, Report 98E-2, January 1999.

How to order the "Advance Report California Vital Statistics, 1998"

To order a copy of the full report, "Advance Report, California Vital Statistics, 1998," contact the Vital Statistics Section at (916) 445-6355 or send your payment with your request of the publication by writing to:

Department of Health Services
Office of Health Information and Research
304 S Street, 3rd Floor
Sacramento, California 95814
The cost of this report is $10.00.

Return to Vital Statistics Data Tables Home Page

PLAINTIFF'S EXHIBIT B

Center for Health Statistics
Death Records

DEATHS BY AGE OF DECEDENT
AGE OF DECEDENT: ALL
RACE/ETHNICITY[1]: ALL
GENDER: ALL
CAUSES OF DEATH: MOTOR VEHICLE ACCIDENTS E810-825
PLACE OF OCCURRENCE: CALIFORNIA
YEAR OF EVENT: 1997

AGE OF DECEDENT	NUMBER OF DEATHS	PERCENT[2]
<1	13	0.3%
1-4	89	2.3%
5-14	168	4.4%
15-24	822	21.6%
25-34	649	17.0%
35-44	570	15.0%
45-54	457	12.0%
55-64	306	8.0%
65-74	305	8.0%
75-84	309	8.1%
85+	116	3.0%
unknown	5	0.1%
TOTAL	3,809	100.0%

[1] *White, Black and Other exclude Hispanic ethnicity. Hispanic includes any race category. Other includes Asian, Pacific Islander and American Indian. Other non-Asian, not stated, and unknown are included in White race category.*

[2] *Percents are rounded independently and may not add to total.*

Source: Department of Health Services, Death Records.

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PLAINTIFF'S EXHIBIT C

Center for Health Statistics
Death Records

DEATHS BY AGE OF DECEDENT
AGE OF DECEDENT: ALL
RACE/ETHNICITY[1]: ALL
GENDER: ALL
CAUSES OF DEATH: ALCOHOL – INDUCED DEATHS
291, 303, 305.0, 357.5, 425.5, 535.3,
571.0-571.3, 790.3, E860.0-E860.1
PLACE OF OCCURRENCE: CALIFORNIA
YEAR OF EVENT: 1997

AGE OF DECEDENT	NUMBER OF DEATHS	PERCENT[2]
15-24	14	0.4%
25-34	129	3.9%
35-44	657	19.6%
45-54	946	28.3%
55-64	749	22.4%
65-74	579	17.3%
75-84	232	6.9%
85+	37	1.1%
unknown	2	0.1%
TOTAL	3,345	100.0%

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[1] *White, Black and Other exclude Hispanic ethnicity. Hispanic includes any race category. Other includes Asian, Pacific Islander and American Indian. Other non-Asian, not stated, and unknown are included in White race category.*

[2] *Percents are rounded independently and may not add to total.*

Source: Department of Health Services, Death Records.

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PLAINTIFF'S EXHIBIT D

OVERVIEW

Tobacco use remains the leading preventable cause of death in the United States, causing more than 400,000 deaths each year and resulting in an annual cost of more than $50 billion in direct medical costs.

Each year, smoking kills more people than AIDS, alcohol, drug abuse, car crashes, murders, suicides, and fires---combined!

Nationally, smoking results in more than 5 million years of potential life lost each year.

Approximately 80% of adult smokers started smoking before the age of 18. Every day, nearly 3,000 young people under the age of 18 become regular smokers.

More than 5 million children living today will die prematurely because of a decision they will make as adolescents ---the decision to smoke cigarettes.

Strategic Vision

Targeting Tobacco Use: The Nation's Leading Cause of Death, At-A-Glance

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Healthy People 2010 Objectives

Healthy People 2000 Objectives

1995 National Household Survey on Drug Abuse, Tobacco Related Statistics, SAMHSA, August 1996

Tobacco Use in the United States---Overview

Impact of Tobacco Use Since the 1964 Surgeon General's Report

Significant Developments Related to Smoking and Health 1964-1996

Selected Actions of the U.S. Government Regarding the Regulation of Tobacco Sales, Marketing, and Use.

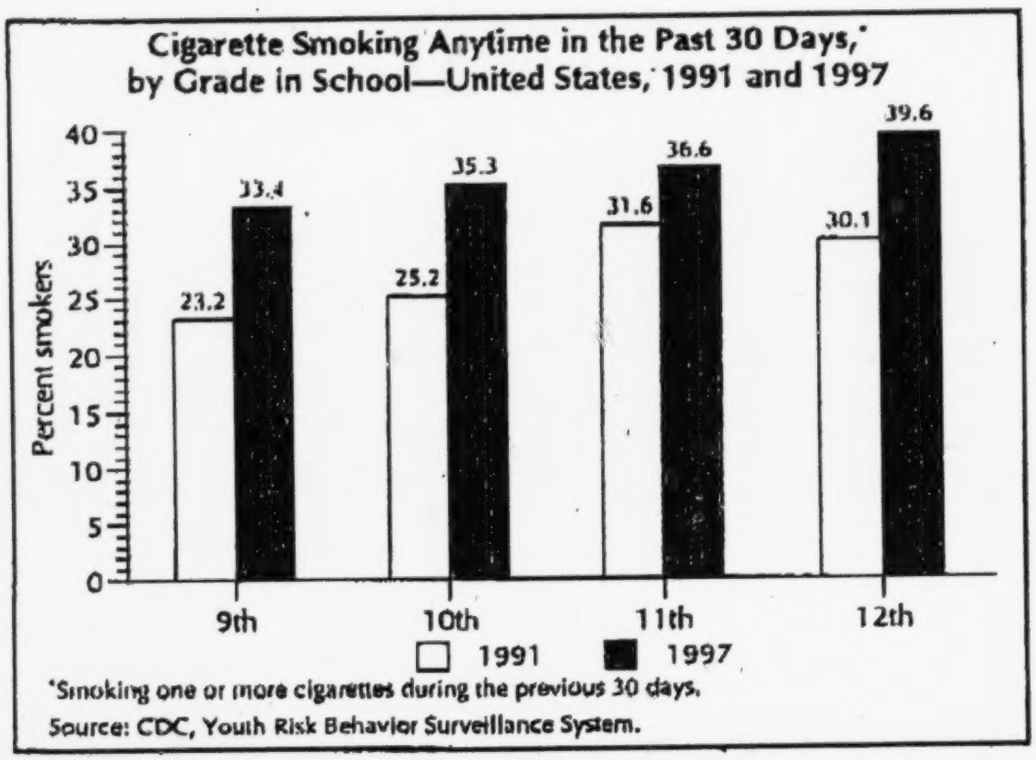
⬅ **TIPS Home Page**

TIPS Tobacco Information and Prevention Source

This document is available in Portable Document Format (PDF-971K) and PostScript Format (PS-2Mb)

Targeting Tobacco Use:
The Nation's Leading Cause of Death

AT-A-GLANCE
2000



"Today, nearly 3,000 young people across our country will begin smoking regularly. Of these 3,000 young people, 1,000 will lose that gamble to the diseases caused by smoking. The net effect of this is that among children living in America today, 5 million will die an early, preventable death because of a decision made as a child."

Donna E. Shalala, PhD
Secretary, U.S. Department of Health and Human Services

Tobacco Use in the United States

BEST AVAILABLE COPY

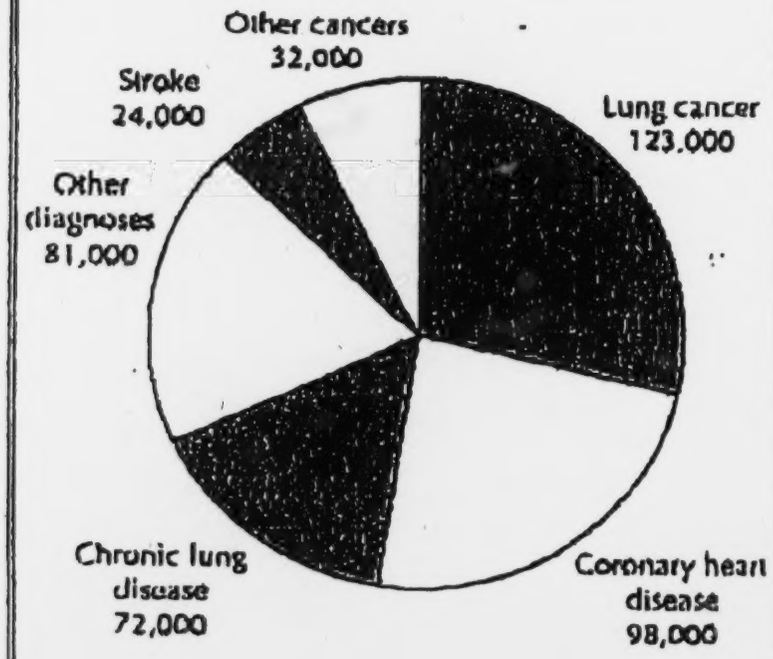
Smoking-related illnesses cost the nation more than $100 billion each year.

An estimated 48 million adults in the United states smoke cigarettes, even though this single behavior will result in death or disability for half of all regular users. Tobacco use is responsible for more than 430,000 deaths each year, or 1 in every 5 deaths. Paralleling this enormous health toll is the economic burden of tobacco use: more than $50 billion in medical expenditures and another $50 billion in indirect costs.

Since the release in 1964 of the first Surgeon General's report on smoking and health, the scientific knowledge about the health consequences of tobacco use has greatly increased. It is now well documented that smoking can cause chronic lung disease, coronary heart disease, and stroke, as well as cancer of the lungs, larynx, esophagus, mouth, and bladder. In addition, smoking is known to contribute to cancer of the cervix, pancreas, and kidneys. Researches have identified more than 40 chemicals in tobacco smoke that cause cancer in humans and animals. Smokeless tobacco and cigars also have deadly consequences, including lung, larynx, esophageal, and oral cancer.

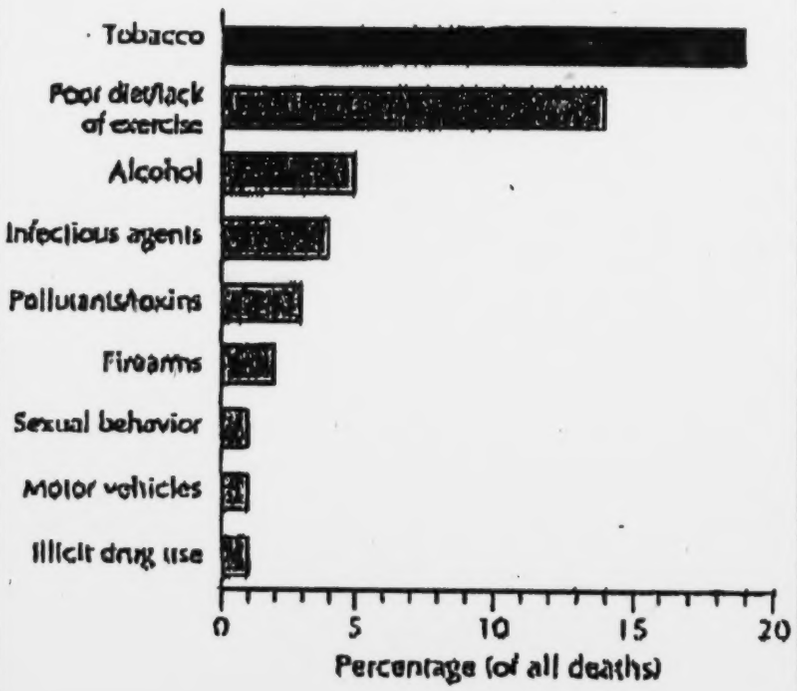
The harmful effects of smoking do not end with the smoker. Women who use tobacco during pregnancy are more likely to have adverse birth outcomes, including babies with low birth weight, which is linked with an increased risk of infant death and with a variety of infant health disorders. The health of nonsmokers is adversely affected by environmental tobacco smoke (ETS). Each year, exposure to ETS causes an estimated 3,000 nonsmoking Americans to die of lung cancer and causes up to 300,000 children to suffer from lower respiratory tract infections. Evidence also indicates that exposure to ETS increases the risk of coronary heart disease.

430,000 U.S. Deaths Attributable Each Year to Cigarette Smoking *



*Average annual number of deaths, 1990-1994.
Source: CDC, *MMWR* 1997;46:448-51

Actual Causes of Death, United States, 1990 *



*The percentages used in this figure are composite approximations derived from published scientific studies that attributed deaths to these causes.
Source: McGinnis JM, Foege WH. Actual causes of death in the United States. *JAMA* 1993;270:2207-12.

California Department of Health Services

Ten Leading Causes of Death
California, 1997 and 1998
By Place of Residence

Cause of Death	ICD Code Ninth Revision	1997		1998	
		Number	Rate	Number	Rate
All Causes	001-999	223,438	678.0	225,450	672.9
Diseases of the Heart	390-398,402,404-429	68,273	207.2	68,946	205.8
Malignant Neoplasms	140-208	51,818	157.2	51,186	152.8
Cerebrovascular Disease	430-438	16,649	50.5	16,385	48.9
Pneumonia and Influenza	480-487	12,286	37.3	13,316	39.7
COPD and Allied Conditions	490-496	11,737	35.6	12,261	36.6
Unintentional Injuries	E800-949	8,762	26.6	8,620	25.7
Diabetes	250	5,611	17.0	5,796	17.3
Cirrhosis	571	3,502	10.6	3,460	10.3
Suicide	E950-959	3,424	10.4	3,215	9.6
Homicide	E960-969	2,780	8.4	2,265	6.8
AIDS	042-044	1,857	5.6	1,432	4.3
All Other Causes	Residual	36,739	NA	38,568	N/A
Source:	State of California, Department of Finance: 1997 and 1998 Population: Population Estimates for California State and Counties, Report 98 E-2, July 1, 1990 through July 1, 1998, January 1999. State of California, Department of Health Services; Death Records.				
Note:	Rates are per 100,000 population. Rates are rounded independently and may not add to totals.				

Return to Vital Statistics Data Tables Home Page

PLAINTIFF'S EXHIBIT E

[Picture Omitted In Printing]

Family knifed while sleeping

Father, two sons, daughter slain in rampage; mom survives

By Joe Mathews and Manuel Gamiz
Los Angeles Times

PICO RIVERA – Moving from bedroom to bedroom, an attacker slashed and stabbed five members of a much-admired Pico Rivera family early Friday, killing a father, his two sons and a daughter and wounding the family's mother as they slept, authorities said.

The floors of the neatly kept yellow house were streaked in blood when Los Angeles County sheriff's deputies arrived. Five of the eight members of the Flores family had been attacked.

Richard Flores, 42, an affable bear of a man, was found dead in the hallway, apparently after struggling with his killer. His wife, Silvia, 39, who survived the stabbing, told investigators she awakened to see a man stabbing her and her husband but did not recognize the attacker.

Authorities say it is unclear whether the man was a stranger to Flores or someone she knew but couldn't identify in the darkness: Flores, who taught religion classes at her parish, was taken to the hospital where she remained in stable condition with wounds to her upper torso. She described her assailant as a cleanshaven man in his 20s.

"We've got a lot of interviewing to do and hopefully that will lead to something," said county sheriff's homicide bureau Lt. Marilyn Baker.

But she acknowledged, as other [illegible] relatives did, that stabbings typically are evidence that the attackers know their victims. Baker said, however, she was unsure whether that applies in this case.

The Floreses' two sons, Richard, 17, and Matthew, 10, were found dead in the bedroom they shared. In another room, the Floreses' 13-year-old daughter, also named Silvia, had been killed.

The family members who escaped injury were sleeping in another bedroom.

In a neighborhood more accustomed to backyard barbecues and pickup basketball games, neighbors and sheriff's deputies conversed with Flores' family members shrieking in agony, "My dad's dead!" and "My brother's dead!"

As the news of the crime spread – stunning friends, school classmates and neighbors – a profile emerged of the Flores family: close-knit, genial- and -athletic. They lived in a community so secure that many people kept their doors unlocked. Authorities said the Floreses' home might have been unlocked Thursday night.

Flores coached youth football, baseball and basketball. Three of his children played competitive sports.

"I don't think you could play organized sports in Pico Rivera and not run into a Flores," said Frank Blanco, 45, a member of the Rivera Baseball Association and Pop Warner football league along with [Illegible].

* * *

Supreme Court, U.S.
FILED
OCT 27 2003
OFFICE OF THE CLERK

No. 03-51

IN THE
SUPREME COURT OF THE UNITED STATES

SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K. MEHL, SGT. STEVEN FOCHT, SGT. DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES, and KEN DEWALD,
PETITIONERS,

-versus-

BILL LOCKYER, Attorney General, and GRAY DAVIS, Governor, State of California,
RESPONDENTS.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Stephen Reinhardt, Raymond C. Fisher, Circuit Judges, & Frank J. Magill, Senior Circuit Judge, Eighth Circuit.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners respectfully submit this REPLY BRIEF in response to newly raised matters in the BRIEF IN OPPOSITION filed by respondents October 22, 2003.

THE CASE

The complaint is a notice pleading subject to the analysis in *Conley v. Gibson*, 355 U.S. 41 (1957). Petitioners make sufficient allegations of standing and ripeness, as set out in the PETITION FOR WRIT OF CERTIORARI, pp. 1-3, including present ownership of firearms subject to the Act, and the desire to acquire arms rendered unlawful by its provisions. The use of such arms is directly in accord with the underlying purposes of the Second Amendment that go back before BLACKSTONE, STORY, and COOLEY.[1]

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[1] *See* I COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (8TH ed. 1927)(personal nature of Second Amendment rights); II BLACKSTONE, *The Rights of Persons*, in COMMENTARIES bk. 1, c. I, 127, 143, 144 (1803). Justice Story wrote this legendary paragraph:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic .... III STORY, COMMENTARIES ON THE CONSTITUTION at 746, §1890 (Rothman 1st ed 1991).

Blackstone stated clearly in his 1803 COMMENTARIES – *supra*, on the fundamental nature of various personal rights, including that of bearing arms for self-defense:

> 5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence ....
>
> [It] is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

The lower court had no difficulty with the sufficiency of the complaint and the ripeness-standing issues, nor did the six Circuit Judges who dissented from denial of rehearing en banc. The opinion below declared one provision of the statute unconstitutional, the exemption allowing retired police to own firearms prohibited to other citizens. *See* PETITION at 101A.

Petitioners would have no difficulty meeting the "[f]earing that they would be prosecuted ..." standard of *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 365 (2002).

The original complaint was filed early in Year 2000. Any ambiguities can be cured by amendment prior to trial to conform to developments in the years intervening.

The BRIEF IN OPPOSITION seriously misstates the posture and case of Petitioners and uses every anti-Second Amendment "buzzword" in the political Lexicon, instead of focusing on relevant case law and the question of certworthiness.

I. CONFLICT WITH PRECEDENT FROM THIS COURT

1. Respondents invoke *Cruikshank*, *Slaughter-House*, *Presser*, and *Miller* as supporting the judgment below and representing "more than 120 years" of holdings that the Second Amendment – unlike the First, Fourth, Fifth, Sixth, and Eighth Amendments[2] - does not apply to the States.

> ... the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birth-right to enjoy entire ....

[2] Relevant cases applying Amendments I, IV, V, VI, and VIII to the States include: *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Watchtower v. Village of Stratton*, 536 U.S. 150 (2002)(prior restraints); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Powell v. Alabama*, 287 U.S. 45 (1932)(presumption of innocence); *Duncan v. Louisiana*,

In fact, however, this Court has not *refused* to apply a Bill of Rights clause to the States in the 78 years since before *Gitlow v. New York*, 268 U.S. 652 (1925)(First Amendment presumed applicable to States). The opportunity to apply the Second Amendment to the States has simply not arisen in an appropriate case under review, not until the present *Silveira* appeal with its several certworthy questions.[3]

Initially, respondents on p. i cite *Miller* as having upheld "the conviction of an individual who violated a federal gun control law ...." That is false and misleading. Miller was not convicted, but exonerated by the lower court, which held the statute unconstitutional under the Second Amendment. 26 F. Supp. 1002 (W.D. Ark. 1939). This kind of error and misstatement permeates the BRIEF IN OPPOSITION.

The Ninth Circuit panel opinion, moreover, explicitly rejected both *Cruikshank* and Presser, stating: "[W]e are in agreement with the Fifth Circuit ... that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited. *See Emerson*, 270 F.3d at 221 n.13." *Silveira*, 312 F.3d at 1067 n.17.[4]

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391 U.S. 145 (1968); *Benton v. Maryland*, 395 U.S. 704 (1969); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Griffin v. California*, 380 U.S. 609 (1965); *Cooper Industries v. Leatherman Tool*, 532 U.S. 424 (2001)(Eighth Amendment); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)(applying just compensation and civil jury right to the States).

[3] It is elementary that denial of certiorari allows no inferences on the merits, although respondents appear to argue otherwise.

[4] Another panel of the Ninth Circuit in *Fresno RPC v. Van de Camp*, 965 F.2d 723 (9th Cir. 1992), however, had explicitly followed *Cruikshank* and *Presser*. The law of the Ninth Circuit on this point is most uncertain and depends upon the panel.

The conflict is this: To follow *Slaughter-House*, *Cruikshank*, and *Presser* would be to disregard the entire line of incorporation cases from the past 78 years: *E.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Benton v. Maryland*, 395 U.S. 704 (1969)(double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964)(Fifth Amendment); and *Cooper Industries v. Leatherman Tool*, 532 U.S. 424 (2001). *Presser* is even at odds with the rationale of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)(applying just compensation and civil jury right to the States).[5]

In reading the BRIEF IN OPPOSITION, one gets the impression that Respondents believe *nothing* in the Bill of Rights should apply to the States. Respondents do not acknowledge *any* of the incorporation cases such as *Benton*, *Duncan*, *Malloy*, and the many others in this important body of jurisprudence.[6]

2. Congressional history, ignored by Respondents, also supports incorporation of the Second Amendment through both the due process and privileges or immunities clauses of the Fourteenth Amendment. The same Congress that proposed the Fourteenth Amendment passed the Freedmens Bureau Act in part to protect "the right of the people to keep and bear arms ..."[7] in the former rebellious Confederate States.[8]

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[5] *Chicago B. & Q.* is often not closely read by scholars and the reference to the civil jury right is usually overlooked.

[6] *See generally* AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), and LEVY, LEONARD W. ORIGINS OF THE BILL OF RIGHTS (Yale 1999).

[7] 14 STAT. 173, 176.

[8] Georgetown Emeritus Professor Antieau notes that in the debates on the Fourteenth Amendment, Senator Howard assured supporters "that Black freedmen would have equality of right 'to keep and bear arms.'" CONGRESSIONAL GLOBE, 39th Cong., 1st Sess., 2765-66. ANTIEAU, THE

As historian Eric Foner emphatically stated:

> But it is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, [and] the right to bear arms .... The Freedmen's Bureau had already taken steps to protect these rights, and the [Fourteenth] Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 258 (1988).[9]

Justice Black's concise Appendix in *Adamson v. California*, 332 U.S. 46, 68 (1947), and Michael Kent Curtis' detailed insightful book carefully examine the historical texts, debates in Congress, party platforms, and constitutional tracts. Curtis concludes: "On careful analysis, these texts provide support for the proposition that the Fourteenth Amendment was designed to apply the Bill of Rights to the States."[10] Curtis observes that "[t]his history shows that the rights set out in the Bill of Rights were cherished and appealed to by antislavery northerners and were disregarded in the South and elsewhere in the interest of protecting slavery."[11]

Overall Curtis "found over **thirty examples** of statements by Republicans during the Thirty-eighth and Thirty-ninth Congresses indicating that they believed that at least some Bill of Rights liberties

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INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 286 (1997).

9 Foner cites CONGRESSIONAL GLOBE, 42d Cong., 1st Sess., Appendix 83; 39th Cong., 1st Sess. 1033, 1088, 2765; and Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237-306 (1982).

10 CURTIS, NO STATE SHALL ABRIDGE 8 (Duke 1986).

11 Id. at 33.

limited the states."[12] Crosskey and Aynes provide further and relatively overwhelming support and analysis.[13] Specific references to the First and Second amendments appear often in this Congressional history. Curtis adds:

> John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. *Not a single senator or congressman contradicted them.* (Emphasis in original).[14]

Today this material is all online in minutes through the Library of Congress and other websites. *See* CONGRESSIONAL GLOBE, 39th Cong., HTTP://MEMORY.LOC.GOV/AMMEM/AMLAW/LLCG_BROWSE.HTML.

The 1908 monumental work of Horace Flack at Johns Hopkins also supports the conclusion that the Fourteenth Amendment protects the individual right to keep and bear arms, and incorporates at least the Bill of Rights, as against state action. Flack traced the legislative history of civil rights bills as well as the Thirteenth and Fourteenth Amendments. He observes that:

> ... it is evident that the right to bear arms was regarded as one of the rights pertaining to citizens, and as this right is secured by the

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[12] Id. at 112 (Emphasis added).

[13] *See* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627 (1994).

[14] Id. at 91. *See also* Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

> Second Amendment, it may reasonably be inferred that the other rights and privileges secured or enumerated by the first eight Amendments were also regarded as belonging to all persons. The bill passed the House February 6, 1866, by a vote of 136 to 33 ....[15]

Congressmen Stevens and Bingham in December of 1865 had both introduced resolutions proposing what in time would become the Fourteenth Amendment. Mr. Bingham stated that the proposal "meant nothing less than conferring upon Congress the power to enforce, in every State of the Union, the Bill of Rights, as found in the first eight amendments."[16]

The respondents totally disregard not only the incorporation jurisprudence of this Court, but also the explicit Congressional history.

3. The decision below conflicts in further ways with precedent from this Court. The notion that Petitioners lack standing because the Ninth Circuit denies Second Amendment protection to individual citizens is wrong and sharply in conflict with decisions from this Court.

Jack Miller, an individual, had standing in *United States v. Miller*, 307 U.S. 174 (1939). Mr. Lawrence in *Lawrence v. Texas*, 539 U.S. ___ (2003), had standing although his arguments may have seemed foreclosed by *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Even Dred Scott had *standing* to sue and appear to argue the merits before Chief Justice Roger Taney!

Judge Kozinski in dissent below notes that *Miller* upheld the standing of the individual defendants, and then decided the merits.[17] The same is true of

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[15] FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 17 (Johns Hopkins 1908).

[16] Id. at 56 & 57.

[17] *Silveira v. Lockyer*, 328 F.3d 567, 569 (9th Cir. 2003)(Kozinski, J. dissenting from denial of rehearing).

Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972)(leading standing-strict scrutiny case). Indeed, Baird had to overcome an adverse 1938 per curiam from this Court. He nonetheless had full personal and *jus tertii* standing to challenge the Massachusetts laws restricting birth control, although those had been unanimously upheld in *Gardner v. Massachusetts*, 305 U.S. 559 (1938)(per curiam).

Since Messrs Miller, Lawrence, Baird and even Dred Scott had standing, so too do Mr. Silveira and his co-petitioners. The issue is certainly certworthy.

4. The position of the court below and that of respondents on ripeness-standing is also in direct conflict with decisions of this Court. Cases such as *Gratz v. Bollinger*, 539 U.S. ___ (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)(ripeness-strict scrutiny); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Griswold v. Connecticut*, 381 U.S. 479 (1965)(standing – strict scrutiny); and *Doe v. Bolton*, 410 U.S. 179 (1973)(ripeness – strict scrutiny), have dealt with standing at length. The position of respondents and the ruling below are contrary to nearly a century of standing and ripeness jurisprudence, including cases as early as *Truax v. Raich*, 239 U.S. 33 (1915)(standing and ripeness in pre-enforcement case).

Although petitioners would face arrest if they should exercise their rights, there is no requirement that petitioners be in imminent danger of arrest before contesting a law that directly burdens their freedom of action. The present controversy is as hard fought and adversarial as *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943)(overruling *Gobitis*)(pre-enforcement challenge allowed prior to effective date of regulation), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925)(pre-enforcement action allowed 17 months before statute would become effective).

The whole purpose of the federal DECLARATORY JUDGMENT ACT, SEN. REP. NO. 1005, 73d CONG., 2d SESS., was to avoid unnecessary risk of prosecution for citizens with a legitimate interest in challenging a burdensome law.

5. The citations on page 6 of Respondents' Brief to cases such as *Lewis*, *Adams*, *Bean*, and *Lopez* are wide of any relevant mark in this case. None was a Second Amendment case, in form, argument, or briefing.

Petitioners have examined the briefs and records in *Lewis*, 445 U.S. 55, 60-68 (1980). The Court there held 6-3 that although a "prior state-court felony conviction may be subject to collateral attack under *Gideon v. Wainwright*, 372 U.S. 335, it could properly be used as a predicate for his subsequent conviction for possession of a firearm in violation of ... [the] Omnibus Crime Control and Safe Streets Act of 1968." Lewis involved nothing more than a convicted felon seeking to prevent authorities from using an invalid uncounseled conviction against him as a sentencing enhancement. The dissenting opinions were persuasive.

6. Lastly, the respondents fail to mention the significant case of *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). *Eldred* is relevant to the militia clause that prefaces the Second Amendment and mentions one of its several purposes. The militia clause, a dangling participle, was explained long ago in Cooley's treatise, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW sec. IV (1898):

> *The Right is General.* -- It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent.

II. CIRCUIT CONFLICT

The BRIEF IN OPPOSITION at 7 denies the sharp Circuit conflict described both by the panel and the Circuit Judges dissenting from denial of rehearing en banc. Respondents attempt to describe the lengthy opinions below as merely "advisory."

In fact, the conflicts among the circuits and the highest courts of the States are several, as described in the PETITION FOR WRIT OF CERTIORARI at 3-27.

III. THIS CASE DOES NOT SEEK AN ADVISORY OPINION – THERE IS AN ACTIVE CASE AND CONTROVERSY

Again, Respondents claim that the decision below and the *Emerson* decision were unnecessary, advisory, and gratuitous dicta. Respondents even go so far as to mis-represent that Petitioners "candidly admit" asking for an advisory opinion. Not so.

This is the kind of case where incremental threshold questions must be resolved by this Court before a trial on the merits can be had. Such cases are a regular occurrence at the appellate level. For example, see *United Building v. Mayor*, 465 U.S. 208 (1984).

CONCLUSIONS

For the reasons set out, this Court should grant certiorari.

RESPECTFULLY,

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IN THE

Supreme Court of the United States

SEAN SILVEIRA, *et als.*,
Petitioner,

v.

BILL LOCKYER, ATTORNEY GENERAL, AND
GRAY DAVIS, GOVERNOR, STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Second and Fourteenth Amendments to the United States Constitution protect the right of individual persons to keep and bear arms for their personal protection and the protection of their loved ones as well as their nation

LIST OF ALL PARTIES TO THE PROCEEDING

a. The plaintiff/petitioner: Sean Silveira, Jack Safford, Patrick Overstreet, David K. Mehl, Steven Focht, David Blalock, Marcus Davis, Vance Boyces, and Ken Dewald, who are represented by Gary W. Gorski, 5033 Blanchard Court, Fair Oaks, California, 95628.

b. The defendant/respondent: the State of California, which is represented by Tim Rieger, Deputy Attorney General, State of California Justice Department, P.O. Box 160487, Sacramento, CA, 95816.

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AMICUS BRIEF IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

Pink Pistols is an unincorporated association established in 2000 to advocate for the interests of gay, lesbian, bisexual, and transgendered (hereinafter GLBT) firearms owners, with specific emphasis on self-defense issues.[1] The parties consented to the filing of this amicus petition by stipulation dated July 9, 2003. There are 37 chapters in 28 states. Membership is open to anyone who supports the rights of GLBT firearms owners regardless of their sexuality.

Pink Pistols is keenly aware of the long history of hate crimes and violence directed at this community, and of police harassment of, and indifference to, this community. Indeed,

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[1] This brief was not written, in whole or in part, by counsel for any party. The fees and costs for this brief are being paid by Pink Pistols members via donations. *See* Rule 37.6.

the genesis of the modern gay rights movement involved resistance to police harassment of patrons of a gay bar—The Stonewall Inn in New York City—in 1969. *See* Faderman, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA 194-95 (1992). The GLBT community thus has historical reason to expect that police will not diligently protect its members from hate crimes.

The right to carry firearms for self-defense has particular relevance for its members because GLBT persons are frequent victims of hate crimes. FBI, UNIFORM CRIME REPORTS (2001) at 59-60 (14.3% of hate crimes reported to FBI in 2001 based on sexual orientation).

Hate crimes based on sexual orientation are the most violent bias crimes. Swigonski, Mama, Ward, Eds., FROM HATE CRIMES TO HUMAN RIGHTS (2001) at 2. Members of hate groups, almost without exception, attack in groups, and target single victims. Schafer & Navarro, *The Seven-Stage Hate Model: The Psychopathology of Hate Groups*, 72:3 FBI L. ENFORCEMENT BULL. 1, 4 (March, 2003). This means that a lone unarmed member of Pink Pistols is unlikely to escape an attack by a hate group without serious injury.

Many bias attacks involve broken bottles, baseball bats, blunt objects, screwdrivers, and belt buckles. *Id.* at 4-5. Firearms are less common because they do not allow the hate group to express their violence personally. *Id.* at 5. A Pink Pistols member who is lawfully carrying a firearm may be able to prevent an attack by displaying and using the firearm, if necessary, in compliance with local self-defense law.

It is vital for members of the GLBT community to be able to lawfully defend themselves against would-be "gay bashers". The opinion of the Court of Appeals for the Ninth Circuit challenged in this case places at risk an individual's

right to possess a firearm for self-defense, and thus places the very lives of Pink Pistols' members at risk.

Pink Pistols therefore urges this Court to take up this important issue and to confirm that the Constitution of the United States protects an individual right to keep and bear arms.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Ninth Circuit's conclusion that the Second Amendment does not confer an individual right to own or possess arms is erroneous. A review of state constitutional analogs to the Second Amendment shows that the Second Amendment encompasses an individual right of individual citizens to possess arms to protect themselves, their families, and their nation. A link between the Second Amendment and the historical militia and modern military would allow states, overtly or sub rosa, to legally disenfranchise women (who were historically not part of the militia and are currently excluded from front-line ground combat) and homosexuals and bisexuals (who are excluded from modern military service). The Court's conclusion allows states to disenfranchise all citizens from firearms ownership, thus leaving Pink Pistols members unable to defend themselves.

ARGUMENT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE SECOND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PROTECT AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS FOR THE PROTECTION OF ONE'S PERSON, FAMILY, AND NATION.

Silveira v. Lockyer, 312 F.3d 1052, 1056 (9th Cir. 2003) holds that "[b]ecause the Second Amendment does not confer

an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision." Here, the petitioners lawfully owned certain firearms until a 1999 amendment to the California Assault Weapons Control Act ("the AWCA") CAL. PENAL CODE § 12275 et seq. *Silveira*, supra, at 1059. The 1999 Amendment required them to "register, relinquish, or render inoperable" these firearms. *Id.*

The *Silveira* decision conflicts with the opinion of the Court of Appeals for the Fifth Circuit in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). It also conflicts with the essential guarantee of the Second Amendment to ensure the right to keep and bear arms for personal protection.

A. The Right to Keep and Bear Arms for Personal Protection is Enshrined in Many State Constitutions.

Among the earliest state constitutions was the Declaration of Rights to the Massachusetts Constitution, which provides that "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." MASS. CONST. Art. I, § 1 (1780). It also states that "The people have a right to keep and to bear arms for the common defence." MASS. CONST. Art. I, § 17 (1780) [2].

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[2] Nearly two centuries later, Massachusetts interpreted § 17 in a manner similar to the *Silveria* court to deny an individual right to keep and bear arms based upon its reference solely to "common defense". *Com. v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976). Detailed analysis of state constitutional interpretations are beyond the page limits of this *amicus* pleading.

The Mississippi Constitution of 1817 provides that "Every citizen has a right to bear arms in defense of himself and the state." MISS. CONST. Art. I, § 23 (1817). The same or similar language is found in CONN. CONST. Art. I, § 15; ALA. CONST. Art. I § 23; ARIZ. CONST. Art. II, § 26; IND. CONST. Art. I, § 32; KAN. BILL OF RIGHTS § 4; MICH. CONST. Art. I, § 6; N.H. CONST. Part I, Art. 2-a; OHIO CONST. Art. I, § 4; ORE. CONST. Art. I, § 27; PENN. CONST. Art. I, § 21; S.D. CONST. Art. 6, § 24; VT. CONST. Art I, § 16; WASH. CONST. Art. I, § 24; W. VA. CONST. Art. III, § 22; WYO. CONST. Art. I, § 24. *See also* DEL. CONST. Art. I, § 20 (1897); NEB. CONST. Art. I, § 1 (1875); NEV. CONST. Art. I, § 11 (1864).

In these clauses, the right to keep and bear arms is linked to a right to personal self-defense, in addition to an obligation to defend the state or the United States. *Silveira*'s analysis of the Second Amendment failed to consider this fundamental link between the right to keep and bear arms and the ability to defend one's self with a weapon.

Five state constitutions contain a "keep and bear arms" clause without the militia preamble found in the Second Amendment to the United States' constitution. *See* ARK. CONST. Art. II, § 5 (1874); FLA. CONST. Art I., § 21 (1838); GA. CONST. Art. I, § 6 (1861); ME. CONST. Art. I § 16 (1820); R.I. CONST. Art. I, § 22 (1843). Five other state constitutions contains identical language to the Second Amendment. ALASKA CONST. Art. I, § 19; HAW. CONST. Art. I. § 17; N.C. CONST. Art. I, § 30; S.C. CONST. Art. I, § 20; VA. CONST. Art. I, § 13. The militia clause cannot be designed solely to protect an 18th century right to state militias when the language was adopted by Alaska and Hawaii in the mid-20th century, long after the creation of a standing national army.

The California, Iowa, Maryland, Minnesota, New Jersey, New York, North Dakota, and Wisconsin state constitutions lack a "keep and bear arms" clause.

Thirteen state constitutions have been specifically written or amended to permit restrictions on the right to carry a firearm, particularly concealed firearms. *See* COLO. CONST. Art. II, § 13; IDAHO CONST. Art I., § 11; ILL. CONST. Art. I, § 22: KY. BILL OF RIGHTS §1: LA. CONST. Art. I, § 11; MO. CONST. Art. I, § 23; MONT. CONST. Art. II, § 12; N.M. CONST. Art. II, § 6; N.C. CONST. ART. I, § 30; OKLA. CONST. Art. II, § 26; TENN. CONST. Art. I, § 26; TEX. CONST. Art. I, § 23; UTAH CONST. Art. I, § 6. Absent such an amendment, the right of an individual to carry a concealed firearm is apparently included within the meaning of the right to "keep and bear arms" in those states.

The majority of state constitutions expressly adopt the "traditional individual rights" model for interpreting the right to keep and bear arms which holds that the right guarantees to individual private citizens a fundamental right to possess and use firearms, subject only to limited government regulation. The Court of Appeals for the Fifth Circuit adopted this view in *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001). *Id.* at 1060. Pink Pistols believes this view is most appropriate for interpreting the Second Amendment to the United States Constitution in order to protect the individual's right to keep and bear firearms for his or her personal protection, protection of the home and family, and protection of the state.

B. The "limited individual rights" Model Allows Legal Discrimination Against Those who Were not Traditionally Eligible for Military Service, such as Women, and Against Those who are not Currently Eligible for Military Service due to their Sexuality.

The *Silveira* court discusses, but does not adopt the second traditional view of the Second Amendment, the "limited individual rights" model, which holds that the Second Amendment guarantees a constitutional right to possess

firearms insofar as such possession bears a reasonable relationship to militia service. *Id.* at 1060. Pink Pistols urges this Court not to adopt this view in its analysis.

Silveira concludes that the term "militia" refers to "the entity ordinarily identified by that designation, the state—created and—organized military force".[3] *Silveira*, *supra*, at 1069. Those who openly engage in homosexual conduct are legally prohibited from military service. 10 U.S.C. § 654. *See e.g. Thomasson v. Perry*, 80 F.3d 915 (en banc), *cert. denied*, 519 US. 948 (1996). If the "militia" refers only to those adults who are eligible for military service, then many GLBT persons could legally be deprived of the right to carry a firearm. *See* 10 U.S.C. § 654(b)(2); *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980), cert. denied sub nom. *Beller v. Lehman*, 452 U.S. 905 (1981). *See Dred Scott v. Sanford*, 60 U.S. 393, 417 (1857) (black citizenship unthinkable as it would carry with it the right of black Americans "to keep and bear arms wherever they went"). It is unclear whether *Lawrence v. Texas*, __ U.S. __ (June 26, 2003), would prohibit states from overtly denying homosexuals and bisexuals the right to carry firearms based upon their sexual orientation if the denial were tied to this interpretation of the militia clause.

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[3] The *Silveira* court further notes that "[T]he prevailing understanding both before and at the time of the adoption of the Constitution was that a "militia" constituted a state military force to which the able-bodied male citizens of the various states might be called to service." *Silveira*, *supra*, at 1071; 10 U.S.C. § 311(a), (b) (defining the "unorganized militia"). If the right to keep and bear arms is limited to those the drafters of the Constitution would have considered members of the militia, women could legally be forbidden to carry firearms. But *see Nunn v. State*, 1 Ga. 243, 251 (1846) (Second Amendment applies to women as well as men).

C. The "collective rights" Model, Adopted by the *Silveira* Court, Facilitates Discrimination Against Gay, Lesbian, Bisexual, and Transgendered Persons, Potentially Placing Such Persons at the Mercy of Hate Crime Groups.

The "collective rights" model asserts that the Second Amendment guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. *Silveira, supra,* at 1087. *See Nordyke v. King*, 319 F.3d 1185, 1192 n.4 (9th Cir. 2003).

The Ninth Circuit discussed this Court's decision in *United States v. Miller*, 307 U.S. 174, 178 (1939) in which this Court related the possession of a shotgun with a short barrel to "some reasonable relationship to the preservation or efficiency of a well regulated militia". *See Silveira, supra*, at 1061. The *Silveira* court also noted that *Miller* stated that "[w]ith the obvious purpose to assure the continuation and render possible the effectiveness of [state militias] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id*; quoted in *Silveira, supra*, at 1061. The *Silveira* court concluded *Miller* rejected the traditional individual rights view. *Silveira*, supra, at 1062. It also noted this Court's opinion in *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) stating that "[T]he Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well-regulated militia.'" *Silveira*, supra, at 1061. With due respect to the Court, implicit in the Second Amendment is also a right to keep and bear arms for individual protection, protection of one's family and of one's community.

1. *If the Second Amendment is Limited to the Maintenance of a State Militia, then Pink Pistols Members can Lawfully be Deprived of a Legal Right to Carry a Firearm for Self-Defense.*

Silveira holds that "The [second] amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use." *Silveira*, *supra*, at 1066. It further concludes that "[t]he historical record makes it equally plain that the amendment was not adopted in order to afford rights to individuals with respect to private gun ownership or possession." *Id.* at 1087. Pink Pistols disagrees with this view of the historical record, for the reasons set forth in *United State v. Emerson*. Under *Silveira*, any state could outlaw personal possession of firearms, or indeed of all weapons, leaving law-abiding citizens helpless to defend themselves against violent attack. *See United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001) ("under this model, the Second Amendment poses no obstacle to the wholesale disarmament of the American people.")

The right to bear arms in self-defense is vital to those who live in high crime areas, who are elderly or infirm, or who are particular targets of crime because of their race, ethnicity, gender, religion, or sexuality. As noted above, the GLBT community is a frequent target of unlawful attacks.

Historically, GLBT persons have not been able to depend upon the police to protect them or to deter hate crimes against their community. Police raids on bars historically involved humiliating group strip-searches and savage beatings. Murdock and Price, COURTING JUSTICE (2001) at 143, 149-50; Amnesty International, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 8 (1997). Relations between police and the gay, lesbian, and

bisexual community are improving. However, even with the best police response, police cannot be everywhere.

The Second Amendment was written decades before the creation of the first professional uniformed police services in London in 1829 and in New York in 1844. *See* Lardner & Reppetto, NYPD: A CITY AND ITS POLICE (2000). It was written when Americans had to depend upon themselves and their neighbors for defense against burglars, robbers, highwaymen, and Indian raids. Had the drafters anticipated modern police forces, they might well have been as concerned about their potential for tyranny and oppression as they were about oppression by a standing army. Setting that potential aside, even the most well-funded and dedicated police department cannot be everywhere to defend every person threatened by a hate crime. Nor would Americans wish to give up the level of personal privacy necessary to allow police to do so were it technically feasible. The Second Amendment is as important for individual self-defense as it is for national defense. The prospective targets of hate groups need the individual protection of the Second Amendment to protect themselves from would-be attackers and killers.

A firearm, lawfully carried and used in self-defense, can effectively deter an attack. It may save the lives of Pink Pistols members. Pink Pistols urges this Court to review and reverse a holding which could disarm its members and the public at large.

2. *If the Constitutional Right to Keep and Bear Arms is Limited to a State-Created and State-Organized Military Force, then Pink Pistols Members can Lawfully be Deprived of a Legal Right to Carry a Firearm Because those who Engage in Homosexual Acts are Excluded from Military Service.*

Southern states once used restrictions on firearms ownership to deny black Americans the ability to enforce

their rights and protect themselves from hate groups such as the Ku Klux Klan. *See* Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 344-345 (1991). Similar restrictions might be imposed on GLBT persons under the rubric of homosexuality as a mental illness or character flaw.

Although the American Psychiatric Association no longer considers homosexuality a mental illness, misconceptions about homosexuality as a mental illness might still be used to deny firearms permits to GLBT persons, just as the Immigration and Naturalization Service once tried to deport homosexual immigrants as "persons afflicted with psychopathic personalities." *See Boutilier v. Immigration Service*, 387 U.S. 118, 120-23 (1967); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

Until recently, security clearances were routinely denied to gay men and lesbians. *See e.g. Adams v. Laird*, 420 F.2d 230, 239 (D.C. App. 1969). A 1995 Executive Order stated that security clearances could no longer be denied solely on the basis of homosexuality. Exec. Order No. 12968, 3 C.F.R. 391, 397 (1996). That order could be rescinded by a similar order.

Following *Lawrence v. Texas*, __ U.S __ (2003), states may not be able to legally deny firearms permits to GLBT persons based on violations of sodomy laws. Some states may continue to use more vague "moral turpitude" status to restrict firearms ownership. *See* Utah Code Ann. § 53-5-704(1)(e) (permit allowed if applicant "has not been convicted of any crimes involving moral turpitude"). It is unclear how *Lawrence v. Texas* will affect moral turpitude clauses.

3. *Under Discretionary Licensing Laws, Pink Pistols Members Could be Denied The Right to Carry Because of their Status.*

Silveira allows states to indirectly prohibit GLBT persons from firearms ownership through laws limiting permits to persons of "good moral character" [4] or to to "suitable persons".[5] Similar laws and cases regarding the character of applicants to state bars [6] and teachers [7] have been used to discriminate against GLBT persons.

If the Second Amendment protects an individual right to own and carry a firearm, then permit restrictions and denials could be challenged as a violation of that right, separate and apart from evolving equal protection standards. The result may be more akin to this Court's holdings concerning the First Amendment rights of gay and lesbian publications than to cases upholding the military's ban on gay men and lesbian servicemembers.

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[4] *See e.g.* CAL. PENAL CODE § 12050 (a)(1)(A); DEL. CODE ANN. tit. 11, § 1441(a); N.J. REV. STAT. § 2C:58-3(c); N.Y. PENAL §400(1)(b). *See also* UTAH CODE ANN. § 53-5-704(1)(e).

[5] *See e.g.* CONN. GEN. STAT. § 29-28(b); MASS. GEN. LAWS ch. 140 § 131(d); R.I. GEN. LAWS § 11-47-11(a).

[6] Compare *In re Florida Board of Bar Examiners*, 403 So.2d 1315 (Fla. App. 1981); *In Re Kimball*, 333 N.Y.2d 586, 347 N.Y.S.2d 453, 301 N.E.2d 430 (1973).

[7] *See e.g. Oklahoma City Board of Education v. National Gay Task Force*, 729 F.2d 1270 (10th Cir. 1984), *cert. denied*, 470 US 903 (1985).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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SEAN SILVEIRA, *et al.*,
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BILL LOCKYER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WOMEN AGAINST GUN CONTROL AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

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BRIEF OF WOMEN AGAINST GUN CONTROL AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

All parties in this appeal have graciously consented to the filing of this brief which supports the position of Petitioners. These consents have been filed with the Clerk of the Supreme Court.

I. PURPOSE AND LOCATION OF THE *AMICUS CURIAE* WOMEN AGAINST GUN CONTROL [*]

Women Against Gun Control is a non-profit corporation in the State of Utah whose officers and directors volunteer their time to promote the right of ordinary people to keep and carry

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[*] Women Against Gun Control is in compliance with S.Ct. Rule 37(6). Counsel for Petitioners did not author this brief in whole or in part. The money to pay for its printing came from Women Against Gun Control.

arms for lawful purposes. Founded in 1994, it has thousands of members with branches in Utah, Missouri, Michigan, Nevada, Indiana, Washington, Arizona, Georgia, New Jersey, Colorado, Alaska, Canada, and Italy. At the time Women Against Gun Control was founded, many of the most outspoken proponents of gun control,[1] such as Sarah Brady,

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[1] "Gun control" as envisioned by groups such as The Brady Campaign To Prevent Handgun Violence, formerly known as Handgun Control, Inc. (HCI), is a "slice-at-a-time" process intended to culminate in gun *prohibition*.

Handgun Control, Inc. was originally known as the National Council To Control Handguns. Its founder, Nelson T. "Pete" Shields, III, was quite candid about his then-fledgling group's ultimate agenda when, in 1976, he stated to *The New Yorker*:

> "We're going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest. Of course, it's true that politicians will then go home and say, 'This is a great law. The problem is solved.' And it's also true that such statements will tend to defuse the gun-control issue for a time. So then we'll have to start working again to strengthen that law, and then again to strengthen the next law, and maybe again and again. Right now, though, we'd be satisfied not with half a loaf but with a slice. Our ultimate goal—total control of handguns in the United States—is going to take time. My estimate is from seven to ten years. The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get all handguns registered. And the final problem is to make the possession of all handguns and all handgun ammunition—except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal." "A Reporter At Large—Handguns", *The New Yorker*, July 26, 1976, p. 53, 57-58.

The "gun control" envisioned by Mr. Shields would eventually preclude possession of a handgun by a private citizen for self-defense.

Almost twenty years later syndicated columnist Charles Krauthammer wrote in the *Washington Post*:

> Ultimately, a civilized society must disarm its citizenry if it is to have a modicum of domestic tranquility of the kind enjoyed by

were women. In addition to grass-roots lobbying, Women Against Gun Control, through numerous electronic and print media contacts,[2] has sought to dispel any public perception that most women are in favor of more restrictive gun laws.

II. SPECIFIC INTEREST OF WOMEN AGAINST GUN CONTROL IN THE COURT'S GRANTING CERTIORARI

Legislators and judges cannot alter biology. Women, despite all of the protections afforded them by statute and case law, and the resultant progress they have made in education and employment remain the physically *weaker* sex. In addition to being generally larger and stronger than women, men, as a group, are also far more prone to commit violent crimes.[3] To the extent that they lack the physical strength and endurance of men, women have a special interest

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sister democracies such as Canada and Britain. Given the frontier history and individualist ideology of the United States, however, this will not come easily. It certainly cannot be done radically. It will probably take one, maybe two generations. It might be 50 years before the United States gets to where Britain is today. Passing a law like the assault weapons ban is a symbolic—purely symbolic—move in that direction. Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation. "Disarm The Citizenry", *Washington Post*, April 5, 1996, p. A19.

[2] Since its founding, officers, directors, or members of Women Against Gun Control have been the subject of hundreds of reports, articles, or interviews, particularly in the Salt Lake City area.

[3] In 2000, the breakdown of arrests for various violent crimes according to sex was as follows: Murder and Non-Negligent Manslaughter, male 7,783 (89.36%), female 926 (10.64%); Forcible Rape, male 17,712 (98.87 %), female 202 (1.13%); Robbery, male 65,026 (89.91%), female 7,294 (10.09%); Aggravated Assault, male 252,921 (79.87%), female 63,709 (20.13%). *Crime In The United States, Uniform Crime Reports*, Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C., 2001, p. 233.

in acquiring and becoming proficient with firearms for use in self-defense.

Any law that impairs access to firearms for self-defense will have a disparate impact on women.[4] The social and economic opportunities that have opened up to women in recent decades are of little consequence to members of their sex who are the subjects of autopsies, on life support, or waiting for an emergency room nurse to retrieve a rape test kit.

"The right to defend oneself against deadly attack is fundamental." *United States v. Panter*, 688 F2d 268, 271 (5th Cir. 1982). *See United States v. Gomez*, 81 F.3d 846, 850 n.7 (9th Cir. 1996). The Second Amendment guarantees the right to a means of self-defense. Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala. L.Rev. 103, 117-120, 130 (1987). Women Against Gun Control have a specific interest in this case in that womens' abilities to exercise their fundamental right of self-preservation is jeopardized if the right guaranteed by the Second Amendment [5] is not considered to be an individual right, or as not being applicable to the States. The interests of women in having ready access to firearms for self-defense is underscored by the fact that local governments have no

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[4] In 2000, there were 260,950 reported rapes or sexual assaults, of which 246,180 (94.33%) involved female victims. *Criminal Victimization 2000*, Bureau of Justice Statistics, U.S. Department of Justice, Washington, D.C., June, 2001, p. 14. 84% did not involve a weapon. *Id.* Thus, in 2000 there were approximately 200,000+ instances where a woman's access to a firearm might have prevented her from becoming a victim. When no weapon is present the assailant's (or assailants') superior strength is a factor that permits an offense to take place. In such circumstances a firearm could give a woman a means of countering her attacker's physical advantage. Even an armed rapist would have something to fear when staring down the barrel of gun.

[5] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

obligation to protect any particular individual. *See DeShaney v. Winnebago County Department Of Social Services*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 258-59 (1989), *South v. Maryland*, 59 U.S. 396, 15 L.Ed. 433 (1856). Assuming that a woman can get to a phone and place a "911" call, she must be prepared to *defend herself* until an officer arrives on the scene.

Given that the police have no obligation to protect any particular individual, the *individual* right of self-defense is meaningless unless one has access to a practical and effective means of deterring or defending against an assault. Firearms give meaning to that right where people, due to size, age, or infirmity, lack the physical strength to fight off those who would harm them. As a brochure for the *Colt's Patent Firearms Mfg. Co.* put it, "Have no fear of any man no matter what his size. When danger threatens call on me, and I shall equalize." [6]

Women Against Gun Control asks this Court to give due regard to the interests of women in "equalizing" things, be it in the workplace or a dark parking lot.

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[6] One Women Against Gun Control T-Shirt reads, "The Second Amendment IS the Equal Rights Amendment."

CONCLUSION

For the reasons set forth above, Women Against Gun Control prays that this Court grant the petition for writ of certiorari, reverse the judgment of the United States Court of Appeals in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2003), and remand the case.

Respectfully submitted,

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SEAN SILVEIRA, JACK SAFFORD, PATRICK OVERSTREET, DAVID K. MEHL, SGT. STEVEN FOCHT, SGT. DAVID BLALOCK, MARCUS DAVIS, VANCE BOYES AND KEN DEWALD,
Petitioners,

v.

BILL LOCKYER, Attorney General and GRAY DAVIS, Governor, State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* JEWS FOR THE PRESERVATION OF FIREARMS OWNERSHIP IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Jews for the Preservation of Firearms Ownership ("JPFO") is a non-profit tax-exempt Wisconsin corporation with more than 5,000 members and many more Internet-based supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th Century's eight major genocides were direct victims of "gun control" laws and policies that disarmed them.

To JPFO, the Second Amendment to the United States Constitution stands as the Founding Fathers' clear and unmistakable legal statement that an armed citizenry is the bulwark of liberty and provides the fundamental basis for law-abiding Americans to defend themselves, their families, their communities and their nation against all aggressors, including, ultimately, a tyrannical government.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

As a civil rights organization, JPFO's paramount interest is the preservation of liberty under the Bill of Rights, and a uniform, proper interpretation of the Second Amendment advances that interest. The instant case would represent the very first time this Court will have taken up a detailed and comprehensive analysis of the nature and scope of the Second Amendment, a provision of the Bill of Rights that is arguably the very last line in the defense of American liberty.

SUMMARY OF THE ARGUMENT

This case raises an issue of fundamental Constitutional importance. The Second Amendment has never been comprehensively addressed by this Court. As Petitioners demonstrate, the federal courts have until recently given little substantive attention to the Second Amendment. Even in *United States v. Miller*, 307 U.S. 174 (1939), the procedural context of the case did not afford this Court an opportunity to delve in as great detail into the nature and scope of the Second Amendment as the Court has done with the other essential aspects of our Constitutional scheme. The result is that there is no clear guidance for any court, federal or otherwise, about the meaning and effect of the Constitutional right to keep and bear arms. Only since the recent case of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), has any federal court addressed the issue comprehensively. The instant case represents the second such attempt, and, as Petitioners demonstrate, it is diametrically opposed to the view expressed in *Emerson*.

It is essential that this Court once and for all take up the issue of the right to keep and bear arms for two main reasons. First, the Framers understood that the right to keep and bear arms is critical to prevent the rise of tyranny. Along with fundamental rights such as free speech, free press, and peaceable assembly, the Framers understood that the right to keep and bear arms is essential for a free people to remain free. They recognized that an armed people can never be subjugated by a tyrannical ruler. Accordingly, they sought to ensure that the newly formed United States could never undermine that fundamental protection. Given that the

Framers' highest priority was preserving a free people from tyranny, this Court should interpret the Second Amendment clearly to further the Framers' intentions in this and subsequent cases.

Second, throughout history the disarmament of populations has substantially increased a people's risk of suffering genocide and mass oppression. History, both recent and distant, is replete with a familiar pattern: the pattern of disarmament and genocide. Throughout the world we have seen first disarmament and then genocide and mass oppression practiced in Ottoman Turkey, the Soviet Union, Nazi Germany, Communist China, Guatemala, Uganda, Cambodia, and Rwanda, to name a few. In our own history we saw African-Americans in the South systematically denied arms in an effort to facilitate oppression. Because disarmament so naturally and inevitably goes hand in hand with mass oppression and genocide, it is critically important that this Court address the Constitutionality of laws that disarm the American people.

ARGUMENT

I. THE COURT SHOULD DEFINITIVELY ADDRESS THE RIGHT TO KEEP AND BEAR ARMS BECAUSE THE FRAMERS UNDERSTOOD THE RIGHT AS FUNDAMENTAL TO PREVENT THE RISE OF TYRANNY

As Petitioners demonstrate, Second Amendment jurisprudence has, until very recently, been given scant substantive attention by the federal courts. In *United States v. Miller*, 307 U.S. 174 (1939), this Court had its first occasion to directly address the right to keep and bear arms. The procedural context of that case precluded this Court from giving the Second Amendment's nature and scope the careful scrutiny that this Court has given the other essential aspects of our Constitutional scheme. As a result there is no clear guidance for any court, federal or otherwise, about the meaning and effect of the Constitutional right to keep and bear arms.

Recently, the Fifth Circuit plunged deeply into the subject in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (Second Amendment broadly protects an individual right to keep and bear arms). *Emerson* represents the first time any federal court has addressed the issue comprehensively. The instant Ninth Circuit case represents the second such attempt, and, as Petitioners demonstrate, it directly opposes the view expressed in *Emerson*.

The Framers of the Constitution understood and did not question the essential role an armed citizenry plays in the defense of a free people. They had before them a rich history

of European despotism from which to draw the keen understanding that armed people are free people. Because the Framers were unmistakably aware of the essential nexus between firearms ownership and liberty, this Court should take up a thorough review of the issue and render a determination, once and for all, regarding the manner in which our Constitution addresses this vital principle of freedom.

Judge Kozinski concisely explained the Framer's understanding in his dissent below:

> But the simple truth born of experience is that tyranny thrives best where government need not fear the wrath of an armed people.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinski, J., dissenting).

Contemporary writings amply evidence that the Framers knew this truth. In the debates over ratification of the Constitution, one New York anti-federalist known as "Brutus" (thought to be New York judge and convention delegate Robert Yates) noted that a great imbalance of power between the government and the people posed a great risk:

> The liberties of the people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power . . . but there is a great hazard that any army will subvert the forms of government, under whose authority they are raised, and

> establish one according to the pleasure of their leader.

Brutus No. X, *The Anti-Federalist Papers and the Constitutional Convention Debates* 287 (Ralph Ketcham ed., 1986).

Alexander Hamilton's answer, in *Federalist* 29, emphasized how the armed citizens would oppose and deter the excesses of a standing army:

> . . . if circumstances at any time should oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens.

The Federalist No. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

James Madison similarly argued that the American people, unlike most of their counterparts in Europe, have the advantage of being armed, and thus a standing army in the hands of a tyrant could not overcome the collective armed defensive efforts of the citizenry. *The Federalist* No. 46 (James Madison).

George Mason, understanding the fundamental nature and function of the militia, noted simply: "I ask, Who are the militia? They consist now of the whole people, except a few

public officers." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 425 (Jonathan Elliot 2d ed., 1836) (remarks of George Mason at the Virginia ratification convention). Thus, the militia was understood to be the whole of the people a peop le armed and ready to defend their liberty against enemies foreign and domestic.

On January 7, 1788, "The Republican" affirmed the benefits of maintaining an armed citizenry:

> . . . It is a capital circumstance in favor of our liberty that the people themselves are the military power of our country. In countries under arbitrary government, the people oppressed and dispirited neither possess arms or know how to use them. Tyrants never feel secure until they have disarmed the people.

The Origin of the Second Amendment 188-91 (David E. Young ed., 1991) (quoting article in The Hartford Courant).

The Framers drew most of their examples from the history of oppressed peoples living under the yoke of despotic European monarchs. One example the Framers sought to emulate, however, was that of Switzerland. The Framers saw the Swiss, the most universally armed citizenry in all of Europe, as a prime example of how a free nation defends itself from external aggression and also from internal usurpation of government power. During the debates over the Militia Act of 1792, Representative James Jackson of Georgia had this to say about the Swiss:

> . . . the people of America would never consent to be deprived of the privilege of carrying arms. . . . The Swiss Cantons owed their emancipation to their militia establishment . . . . In a Republic, every man ought to be a soldier, and prepared to resist tyranny and usurpation, as well as invasion, and to prevent the greatest of all evils – a standing army.

2 Annals of Cong. 1852-53 (1790). The Swiss example demonstrated to the Framers how an armed citizenry could forestall the rise of tyranny.

In addition, the Framers could refer to the long history of English law. Blackstone listed the right to possess arms as one of the five auxiliary rights of English subjects without which their primary rights could not be maintained. 1 William Blackstone, *Commentaries* *143-44.

In his dissent to the instant Ninth Circuit decision below, Judge Kleinfeld noted that the "historical context of the Second Amendment is a long struggle by the English citizenry to enable common people to possess firearms." *Silveira*, 328 F.3d at 582 n.76.

The struggle culminated in the drafting of the English Declaration of Rights. In the aftermath of Charles II's and James II's attempts to disarm the people, the Declaration of Rights became an explicit condition to the accession of William and Mary to the throne in 1689. It is the Declaration of Rights that forms the basis of Blackstone's understanding of the basic rights of Englishmen. *Id.* at 582-83.

Aptly describing the Second Amendment as a "doomsday provision," Judge Kozinski saw the Amendment as

> one designed for those exceptionally rare circumstances where all other rights have failed---where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies seem today, facing them unprepared is a mistake a free people get to make only once.

Id. at 570.

Historical documents disclose the Framers' deep concern about the potential rise of tyranny and the people's means to deter it. *See Emerson*, 270 F.3d at 227; Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 55-87 (2d ed. 1994) (quoting and citing numerous original sources). That this Court has never thoroughly analyzed this issue of such fundamental importance to the Framers argues forcefully for a definitive resolution of the issue now.

Because the Framers understood that an armed populace is essential to prevent the rise of tyranny, this Court should grant the Petition for a Writ of Certiorari to definitively determine the nature and scope of the Constitutional right to keep and bear arms.

II. THE COURT SHOULD DEFINITIVELY ADDRESS THE CONSTITUTIONALITY OF LAWS THAT DISARM THE AMERICAN POPULACE BECAUSE THROUGHOUT HISTORY THE DISARMAMENT OF POPULATIONS HAS SIGNIFICANTLY INCREASED A PEOPLE'S RISK OF SUFFERING GENOCIDE AND MASS OPPRESSION

> All too many of the great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few--- were perpetrated by armed troops against unarmed populations.

Silveira, 328 F.3d at 569-70 (Kozinski, J., dissenting).

Denying the individual right to keep and bear arms has been a *modus operandi* of official repression since the advent of the modern state. The Ninth Circuit decision below follows an ominous footpath. Because of the tragic history of citizen disarmament, this Court should grant certiorari and seize the opportunity to decide whether the Ninth Circuit's course is permissible under our Constitution.

Sobering it is to realize that every instance of genocide of the Twentieth Century was made possible by the disarmament of a civilian population. Upwards of 70 million people were killed in Ottoman Turkey (1915-17), the Soviet Union (1929-45), Nazi Germany and Occupied Europe (1933-1945), Nationalist China (1927-1949), Communist China (1949-52, 1957-60, and 1966-70), Guatemala (1960-81), Uganda (1971-79), Cambodia (1975-79), and Rwanda (1994). *See* Aaron Zelman & Richard W. Stevens, *Death by "Gun Control": The Human Cost of Victim Disarmament* 3 (2001);

see also R. J. Rummel, *Death by Government* (1997) (comprehensive analysis of genocide resulting from imbalance of power between civilians and governments). Some governments have massively confiscated weapons prior to committing mass murder. In other cases, confiscation followed after the groundwork was laid by "reasonable" regulation and registration of firearms.

A prime example is the Ottoman Empire's near total extermination of the Armenians. After deposing Sultan Abdul Hamid II in 1908, the reforming "Young Turks" enacted Article 166 of the Ottoman Penal Code (1911) prohibiting the possession, carrying, and importation of "prohibited weapons" without government permission. Zelman & Stevens, *supra*, at 145. Subsequently the Turkish government ordered that all Armenians turn over all firearms, bombs, and daggers. The government further ordered that the Armenians be deported to concentration camps, and that any Armenians "who dare to use arms" to resist deportation were to be "arrested dead." *Id.* at 136-38 (*citing* Official Proclamation to Deport Armenians, June 26, 1915, Preamble, Item 5, Item 6).

Ultimately, between 1 and 1.5 million Armenians were murdered by their government. The victims had been rendered ill-equipped to raise a hand in their own defense.

Certainly the most infamous genocide of the Twentieth Century was the Nazi slaughter of the European Jews. Less well-known is the role that legal gun control played. Seemingly innocuous, a 1928 law enacted by the liberal pre-Nazi Weimar government prohibited firearms ownership without a license. After they attained power,

however, the Nazis were able to selectively enforce this law against the Jews. A 1936 memorandum of the Bavarian Political Police documents the procedure:

> In principle, there will be very few occasions where concerns will not be raised regarding the issuance of weapons permits to Jews. As a rule, we have to assume that firearms in the hands of the Jews represent a considerable danger to the German people.

Id. at 89-90 (*citing* Bayerishe Politische Polizei, Waffenscheinen an Juden, February 5, 1936). Eventually the Nazis ended the "registration" charade. In a series of decrees issued in November 1938, all German Jews were prohibited from possessing firearms. *Id.* at 95-98 (*citing, inter alia, Nazis Smash, Loot and Burn Jewish Shops and Temples Until Goebbels Calls Halt*, New York Times, Nov. 11, 1938, at 1).

In 1938, the Nazis also updated the 1928 law and severely limited the rights of non-Jews to own firearms. Exempt from this law were "authorities of the Reich," "various government entities," and "departments and their subdivisions of the National Socialist Workers' Party designated by the deputy of the Führer." *Id.* at 90-91 (*citing* Reichgesetzblatt 1938, I, 265, §11). The Nazi laws simplified the job of rounding up Jews and other declared "enemies of the State."

In his dissent below, Judge Kozinski noted:

> If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht

> for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

Silveira, 328 F.3d at 570 (Kozinski, J., dissenting). *See also* Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 Arizona J. Int'l & Comp. L. 483 (2000) (Nazi augmentation of Weimar gun control laws rendered Jews defenseless against officially sanctioned arms roundups and eventual victimization).

More recently, the world saw approximately 800,000 members of the Rwandan Tutsi tribe slaughtered by their Hutu rulers during the Spring and Summer of 1994 due to a 1979 law that left the Tutsi minority largely disarmed. Zelman & Stevens, *supra*, at 123-31 (citing original sources).

Today the formula is playing out in Zimbabwe. The government there has supported large-scale violence against white land owners and has undertaken a comprehensive round up of firearms owned by those landowners. *Id.* at 183-97 (citing original reports).

Civilian disarmament also played an unfortunate part in our own nation's history of state-approved repression of African Americans. There was a wide variety of "gun control for blacks" legislation, both before and after the Civil War, including both naked prohibition and licensing. Zelman & Stevens, *supra*, at 204 (citing numerous sources). When slavery was legal, the slave states had comprehensive legal and customary prohibitions on black ownership of firearms. Robert J. Cottrol & Raymond T. Diamond, *The Second*

Amendment: Towards an Afro-Americanist Reconsideration, 80 Geo. L. Rev. 309, 335-38 (1991). For example, in Florida, "patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process." *Id.* In the North, however, blacks successfully defended themselves against mob violence by bearing arms in their own defense. *Id.* at 341-42 (*cited in Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting)).

In *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857), Chief Justice Taney noted that black citizenship was unthinkable because blacks would have "the right to keep and carry arms wherever they went."

Disarmament consistently appeared as a component of the post-Civil War Black Codes designed to limit blacks' freedom as much as possible. *Silveira*, 328 F.3d at 577 (dissenting opinion); Cottrol & Diamond, *supra*, at 344. For instance, Mississippi enacted a statute specifically prohibiting freed blacks from owning and possessing any weapon without a license. Cottrol & Diamond, *supra*, at 344 n.176. Louisiana and Alabama followed suit. *Id.* at 344-345 nn.176-178 (citing and quoting original sources).

The passage of the Fourteenth Amendment invalidated the expressly racial "gun control" laws, but restrictions on firearms possession continued. Examples include laws that permitted the carrying of military firearms, but not inexpensive weapons that freed blacks could afford. Such laws rendered blacks defenseless in public places where racial attacks often occurred. *See* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to Be Applied to the White Population": Firearms Regulation and Racial Disparity--the*

Redeemed South's Legacy To a National Jurisprudence, 70 Chi.-Kent L. Rev. 1307-1335 (1995). "The model of gun control that emerged from the redeemed South is a model of distrust for the South's untrustworthy and unredeemed class, a class deemed both different and inferior, the class of Americans of African descent." *Id.* at 1333.

The racial design of civilian disarmament laws was no secret. Thus, in *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941), in his special concurrence, Justice Buford noted that the Florida gun control provision at issue was specifically passed to "for the purpose of disarming Negro laborers . . . [and] was never intended to be applied to the white population."

The black freedmen understood that their disarmament would only be the beginning of white oppression. One Louisiana black wrote in 1865, "As one of the disenfranchised race, I would say to every colored soldier, 'Bring your gun home.'" Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 120 (1988).

Legal restrictions on blacks' firearm ownership meant that blacks frequently were unable to protect themselves from white terrorists and lynchers. "Disarmament was the tool of choice for subjugating both slaves and free blacks in the South." *Silveira*, 328 F.3d at 569 (Kozinski, J., dissenting).

Further, "[p]rivate terrorist organizations, such as the Ku Klux Klan, were abetted by southern state governments' refusal to protect black citizens, and the violence of such could groups could only be realistically resisted with private firearms." *Silveira*, 328 F.3d at 577 (Kleinfeld, J. dissenting).

The tragic history of civilian disarmament cries a warning against any systematic attempts to render innocent citizens ill-equipped to defend themselves from tyrants, terrorists, despots or oppressive majorities. Given the grave consequences of civilian disarmament and the Framers' express efforts to preclude such disarmament, there can be few issues more worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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SEAN SILVEIRA, *et al.*,
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v.

BILL LOCKYER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SECOND AMENDMENT SISTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

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BRIEF OF SECOND AMENDMENT SISTERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

All parties in this appeal have graciously consented to the filing of this brief which supports the position of Petitioners. These consents have been filed with the Clerk of the Supreme Court.

I. PURPOSE AND LOCATION OF THE *AMICUS CURIAE* SECOND AMENDMENT SISTERS, INC [*]

Second Amendment Sisters, Inc. is a 501(c)(3) Corporation, chartered in the Commonwealth of Virginia. It

[*] Second Amendment Sisters, Inc. is in compliance with S.Ct. Rule 37(6). Counsel for Petitioners did not author this brief in whole or in part. The money to pay for its printing came from Second Amendment Sisters, Inc.

was formed for the purpose of, "educating women to resist rape and violence against women, and promoting firearms safety". Your *amicus* is organized into forty-two State Chapters and has a mostly female membership representing each of the fifty States. Its mission statement reads:

> "Second Amendment Sisters, Inc. is a women's advocacy group dedicated to promoting the basic human right to self-defense, as recognized by the Second Amendment.
>
> We believe in personal responsibility, education, and enforcement of laws against violent criminals."

II. SPECIFIC INTEREST OF SECOND AMENDMENT SISTERS, INC. IN THE COURT'S GRANTING CERTIORARI

Legislators and judges cannot alter biology. Women, despite all of the protections afforded them by statute and case law, and the resultant progress they have made in education and employment remain the physically *weaker* sex. In addition to being generally larger and stronger than women, men, as a group, are also far more prone to commit violent crimes.[1] To the extent that they lack the physical strength and endurance of men, women have a special interest in acquiring and becoming proficient with firearms for use in self-defense.[2] Laws that impair access to firearms for self-

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[1] In 2000, the breakdown of arrests for various violent crimes according to sex was as follows: Murder and Non-Negligent Manslaughter, male 7,783 (89.36%), female 926 (10.64%); Forcible Rape, male 17,712 (98.87 %), female 202 (1.13%); Robbery, male 65,026 (89.91%), female 7,294 (10.09%); Aggravated Assault, male 252,921 (79.87%), female 63,709 (20.13%). *Crime In The United States, Uniform Crime Reports*, Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C., 2001, p. 233.

[2] In 2000, there were 260,950 reported rapes or sexual assaults, of which 246,180 (94.33%) involved female victims. *Criminal Victimization 2000*, Bureau of Justice Statistics, U.S. Department of Justice,

defense have a disparate impact on women.[3] The social and economic opportunities that have opened up to women in recent decades are of little consequence to members of their sex who are the subjects of autopsies, on life support, or waiting for an emergency room nurse to retrieve a rape test kit. What is generically referred to as "gun control" [4] is often

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Washington, D.C., June, 2001, p. 14. 84% did not involve a weapon. *Id.* Thus, in 2000 there were approximately 200,000+ instances where a woman's access to a firearm might have prevented her from becoming a victim. When no weapon is present the assailant's (or assailants') superior strength is a factor that permits an offense to take place. In such circumstances a firearm could give a woman a means of countering her attacker's physical advantage. Even an armed rapist would have something to fear when *staring down the barrel of gun.*

[3] As reflected in note 2, *supra*, in 2000, the overwhelming majority (94.33%) of victims of reported rapes and other sexual assaults were women.

[4] "Gun control" as envisioned by groups such as The Brady Campaign To Prevent Handgun Violence, formerly known as Handgun Control, Inc. (HCI), is a "slice-at-a-time" process intended to culminate in gun *prohibition.* Handgun Control, Inc. was originally known as the National Council To Control Handguns. Its founder, Nelson T. "Pete" Shields, III, was quite candid about his then-fledgling group's ultimate agenda when, in 1976, he stated to *The New Yorker*:

> "We're going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest. Of course, it's true that politicians will then go home and say, 'This is a great law. The problem is solved.' And it's also true that such statements will tend to defuse the gun-control issue for a time. So then we'll have to start working again to strengthen that law, and then again to strengthen the next law, and maybe again and again. Right now, though, we'd be satisfied not with half a loaf but with a slice. Our ultimate goal—total control of handguns in the United States—is going to take time. My estimate is from seven to ten years. The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get all handguns registered. And the final problem is to make the possession of all handguns and all handgun ammunition—except for the military, policemen, licensed security

a hindrance to women who, if armed, might have a fighting chance.

"The right to defend oneself against deadly attack is fundamental." *United States v. Panter*, 688 F2d 268, 271 (5th Cir. 1982). *See United States v. Gomez*, 81 F.3d 846, 850 n.7 (9th Cir. 1996). The Second Amendment guarantees the right to a means of self-defense. Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 Ala.

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guards, licensed sporting clubs, and licensed gun collectors—totally illegal." A Reporter At Large—Handguns", *The New Yorker*, July 26, 1976, p. 53, 57-58.

The "gun control" envisioned by Mr. Shields would eventually preclude possession of a handgun by a private citizen for self-defense. The views expressed in *The New Yorker* interview were not a short-lived aberration. Almost twenty years later syndicated columnist Charles Krauthammer wrote in the *Washington Post*:

> Ultimately, a civilized society must disarm its citizenry if it is to have a modicum of domestic tranquility of the kind enjoyed by sister democracies such as Canada and Britain. Given the frontier history and individualist ideology of the United States, however, this will not come easily. It certainly cannot be done radically. It will probably take one, maybe two generations. It might be 50 years before the United States gets to where Britain is today. Passing a law like the assault weapons ban is a symbolic–purely symbolic–move in that direction. *Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation.* "Disarm The Citizenry", *Washington Post*, April 5, 1996, p. A19. (italics added)

"[O]ne step at a time . . .]", "[N]ot to reduce crime *but to desensitize the public* . . ." These passages exemplify the disdain elites have for ordinary people who were not bright enough to attend Ivy League schools or afford homes in posh, *safe*, neighborhoods. Most of "the people" referenced in the Second Amendment do not travel in the same circles as Messrs. Shields and Krauthammer, or the publishers of *The New Yorker* or the *Washington Post*. Their paths in life sometimes require that they live or work in neighborhoods that are not as genteel as Georgetown, Potomac, or the Upper East Side of Manhattan.

L.Rev. 103, 117-120, 130 (1987). Second Amendment Sisters, Inc. has a specific interest in this case in that womens' abilities to exercise their fundamental right of self-preservation is jeopardized if the right guaranteed by the Second Amendment[5] is not considered to be an individual right, or as not being applicable to the States. The interests of women in having ready access to firearms for self-defense is underscored by the fact that local governments have no obligation to protect any particular individual. *See DeShaney v. Winnebago County Department Of Social Services*, 489 U.S. 189, 196-97, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 258-59 (1989), *South v. Maryland*, 59 U.S. 396, 15 L.Ed. 433 (1856). Assuming that a woman can get to a phone and place a "911" call, she must be prepared to *defend herself* until an officer arrives on the scene.

Given that the police have no obligation to protect any particular individual, the *individual* right of self-defense is meaningless unless one has access to a practical and effective means of deterring or defending against an assault. Firearms give meaning to that right where people, due to size, age, or infirmity, lack the physical strength to fight off those who would harm them. As a brochure for the *Colt's Patent Firearms Mfg. Co.* put it, "Have no fear of any man no matter what his size. When danger threatens call on me, and I shall equalize."

Second Amendment Sisters, Inc. asks this Court to give due regard to the interests of women in "equalizing" things, be it in the workplace or a dark parking lot.

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[5] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

CONCLUSION

For the reasons set forth above, Second Amendment Sisters, Inc. prays that this Court grant the petition for writ of certiorari, reverse the judgment of the United States Court of Appeals in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2003), and remand the case.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Rifle Association (the "NRA") is a nonprofit voluntary membership corporation. Its 4 million members are bound together by a common desire to ensure the preservation of the Second Amendment right of individual citizens to keep and bear arms. More than 250,000 of the NRA's members reside in California and thus are subject to the Assault Weapons Control Act ("AWCA"), which forbids the purchase of many so-called "assault weapons" and requires registration of grandfathered guns. The Ninth Circuit upheld the AWCA based on its conclusion that the Second Amendment does not guarantee any individual the right to keep and bear arms. Thus, the NRA's most vital interest is directly implicated by the Ninth Circuit's decision, which effectively writes the Second Amendment out of the Constitution.

SUMMARY OF ARGUMENT

1. Petitioners have standing under Article III to challenge the AWCA. The Ninth Circuit reasoned that the Second Amendment provides only a "collective right" to the States and thus that individuals have no standing to challenge laws prohibiting gun ownership. In so holding, the court conflated the standing and merits inquiries in contravention of this Court's settled precedent that plaintiffs' legal theories are assumed to be valid for purposes of determining standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975).

2. The Second Amendment applies to the States. Although the Ninth Circuit neglected to analyze this threshold question, this Court should clarify that *United States v. Cruikshank*, 2 Otto (92 U.S.) 542, 553 (1876),

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it authored this brief and that no entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus* brief.

which held that the Second Amendment was not incorporated against the States, is no longer good law. The debate surrounding the adoption of the Fourteenth Amendment makes plain that its Framers fully intended to ensure that States could not transgress an individual's right to keep and bear arms.

3. The Second Amendment secures individual liberties, as does each provision of the Bill of Rights. We know this from the text of the Second Amendment, which guarantees "the *right of the people* to keep and bear arms." We know this from the historical record, which reveals that at the time of the founding citizens had the right, and indeed the duty, to possess and have at the ready a firearm. And we know this from the very purposes of the Amendment – the preservation of the rights of self-defense and resistance to government oppression – purposes which depend upon individual ownership of firearms.

REASONS FOR GRANTING THE WRIT

The decision below addresses a question of paramount national importance: the meaning of the Second Amendment, a core provision of the Bill of Rights. As Circuit Judge Kleinfeld noted, the decision below effectively strips 20 percent of the American people of their constitutional right to keep and bear arms. Appendix to Petition for a Writ of Certiorari ("Pet. App.") 49. This Court should grant certiorari to resolve the sharp split in authority between the Ninth Circuit's decision below and the Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), which conclusively demonstrated that individuals have a constitutional right to keep and bear arms.

I. Petitioners Have Article III Standing To Challenge the Assault Weapons Control Act.

The Ninth Circuit held that petitioners had no standing to challenge the provisions of the AWCA as a violation of the Second Amendment, because that Amendment

confers a collective, rather than an individual, right. Under the Ninth Circuit's approach, then, any party whose claim rests on an erroneous legal premise loses not on the merits, but lacks standing. As the Seventh Circuit correctly recognized, that is not the law. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 & n.12 (7th Cir. 1999). For purposes of standing, a federal court must accept a plaintiff's legal argument as correct. *See Warth*, 422 U.S. at 501.

Petitioners clearly have Article III standing. They are individuals who either own firearms subject to the registration requirements of the AWCA or would like to own weapons that may not be purchased now. Petitioners have suffered an injury-in-fact, caused by the challenged provisions, which would be redressed by a decision holding that the challenged provisions are unconstitutional. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[2]

II. The Second Amendment's Guarantee Of An Individual Right To Keep And Bear Arms Applies To State Action.

Although the Ninth Circuit engaged in a detailed discussion of the meaning of the Second Amendment in its "standing" analysis, the panel failed to consider the threshold question of whether the Amendment even applies to the States. *See* Pet. App. 94 ("Because we decide

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[2] To be sure, the D.C. Circuit found that plaintiffs lacked standing to challenge the Violent Crime Control and Law Enforcement Act of 1994, where they had failed to demonstrate that the "threat of prosecution [for violating the law]" was "genuine" and "imminent." *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (a plaintiff must face a "genuine threat of imminent prosecution" to obtain standing) (citation omitted). But this Court has never required individuals to risk criminal prosecution in order to vindicate their constitutional rights. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 332 (1999).

this case on the threshold issue of standing, however, we need not consider the question whether the Second Amendment presently enjoins any action on the part of the states."). Even though the court below did not address the incorporation issue, this Court should grant certiorari to resolve this important question. Over a century ago, this Court held that the Second Amendment was not incorporated against the States. *See Cruikshank*, 92 U.S. at 553.[3] *Cruikshank* and its progeny were decided, however, before the Court incorporated virtually every provision of the Bill of Rights against the States. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Thus, there is now widespread agreement that *Cruikshank* is not good law. *See* Pet. App. 94 ("One point about which we are in agreement with the Fifth Circuit is that *Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited.").[4]

In determining which provisions of the Bill of Rights are incorporated, the Court has assessed whether the right is "so rooted in the tradition and conscience of our people to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citation omitted). In *Duncan*, the Court identified four factors that guide this inquiry: (1) the history of the right; (2) historical recognition of the right by the States; (3) recent trends, including current recognition by States, with respect to the right; and (4) the purposes behind the right. *Duncan*, 391 U.S. at 151-56. As demonstrated below, each of these factors supports

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[3] *See also Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (noting in *dicta* that the Second Amendment "is a limitation only upon the power of Congress and the National government, and not upon that of the States"); *Miller v. Texas*, 153 U.S. 535, 538 (1894) ("[I]t is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts.").

[4] Recent scholarship addressing this issue has concluded that the Second Amendment is incorporated against the States. *See, e.g.*, Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 898-901 (2001).

incorporating the right to keep and bear arms through the Due Process Clause of the Fourteenth Amendment.

1. The right of individuals to keep and bear arms is a bedrock feature of the Anglo-American legal tradition and was firmly established in the British Bill of Rights. *See* 1 W. & M. 2, ch. 2, 7 (1689); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831, 832 (1998); *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). In the English tradition, that right was understood to serve at least two purposes: an individual's rights to self-preservation, and to resist oppression. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *143-*144 (1765). Thus, "'the preservation [of this right] as a protection against arbitrary rule [was] among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.'" Nelson Lund, *The Past & Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 54 (1996) (hereinafter "Lund") (quoting *Duncan*). As the Court in *United States v. Miller*, 307 U.S. 174, 179 (1939), recognized, the colonies mandated the exercise of this right by imposing a "'general obligation [on] all adult male inhabitants to possess arms. . . .'" *Id.* (quoting 1 OSGOOD, THE AMERICAN COLONIES IN THE 17TH CENTURY).

The right to keep and bear arms played a significant role in the process of ratifying the Constitution. At the Pennsylvania Convention, for example, the Anti-Federalists made clear that the omission of an individual right to bear arms was a primary reason for rejecting ratification. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 623-24 (Merrill Jensen ed., 1976). "Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights," *Duncan*, 391 U.S. at 153, and the right to bear arms was "the most frequently appearing proposed amendment." William Plouffle, *A Federal Court Holds the Second Amendment Is An Individual Right: Jeffersonian Utopia or Apocalypse Now?*, 30 U. MEM. L. REV. 56, 80 (1999) (hereinafter "Plouffle"). Immediately after the adoption of the Second

Amendment, the Second Congress passed the Militia Act *requiring* every male citizen between the age of 18 and 45 to own a firearm and ammunition. 1 Stat. 271 (1792).

Most importantly, the historical evidence surrounding the adoption of the Fourteenth Amendment confirms that it was intended to prevent the States from abridging "the personal right guaranteed and secured by the first eight amendments of the Constitution, such as . . . the right to keep and bear arms." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Senator Howard). Thaddeus Stevens confirmed that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). And there can be no doubt that the Second Amendment was included among the provisions that Congress sought to apply to the States. During the same year as the Fourteenth Amendment was debated, Congress passed legislation aimed at reversing the southern States' efforts to disarm the newly freed black citizens. Specifically, in the Freedmen's Bureau Bill of 1866, Congress made clear that "in every State [lately in rebellion] the right . . . to have full and equal benefit of all laws . . . including *the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens* of such State . . . without respect to race or color, or previous condition of slavery." Freedmen's Bureau Act of 1866, 14 Stat. 173, 176-77 (1866) (emphasis added).

2. From the founding of the Republic, the States have recognized the right to keep and bear arms. When the Second Amendment was adopted, almost half of the States with bills of rights included provisions recognizing that right, and many States affirmatively protected the right.[5] Recognizing the value of a well-armed populace,

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[5] *See* Lund, at 54; Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 259, tbl. III (1992); Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to*

(Continued on following page)

many States went farther, requiring the ownership of guns. Plouffle, at 64.

3. Forty-four States continue to maintain constitutional provisions protecting the right to keep and bear arms. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989), Appendix (collecting provisions); WIS. CONST. art. I, § 25. Since 1970, fifteen States "have enacted new state constitutional rights to bear arms or strengthened old ones." Janice Baker, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms Into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 48-49 (2002) (internal quotation omitted). State laws also reflect the modern consensus as to the importance of the right to bear arms. Currently, thirty-five States allow large classes of individuals to carry concealed firearms. *See id.*

4. The Second Amendment was intended, in part, to promote the right of self-defense. *See, e.g.*, Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992); Lund, at 12 (citing WILLIAM BLACKSTONE, COMMENTARIES at 136, 139). Given the level of criminal activity that pervades our society, the right of individuals to protect themselves and their property with a firearm is as important as ever. Put simply, "our modern governments have proved no more able . . . to protect law-abiding citizens from criminal predators than their predecessors were." *Id.* at 55. "More important, the police do not and cannot protect law-abiding citizens from criminal violence." *Id.* at 61-62. *See also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993). In today's society, the Second

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Bear Arms Into the Fourteenth Amendment, 28 U. DAYTON L. REV. 35, 41 (2002) (citing authorities).

Amendment remains an essential bulwark against the predations of violent criminals.

The Second Amendment right to keep and bear arms also empowers the citizenry to protect against state-sponsored or private oppression. Justice Story captured this basic truth:

> One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia. The friends of a free government cannot be too watchful, to overcome the dangerous tendency of the public mind to sacrifice, for the sake of mere private convenience, this powerful check upon the designs of ambitious men.

JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, at 264 (1840). This historical leitmotif is reflected in this Nation's foundation. The British attempted just such tactics on the eve of the American Revolution. The Militia Acts of 1757 and 1763 authorized British officials to "seize and remove the arms" of colonists, and it was just such an effort by General Gage that led to the Battles of Lexington and Concord. *See* Pet. App. 62.

The historical experience that led to the ratification of the Second Amendment remains as vital at the end of the Twentieth Century as at any time. As Judge Kozinski eloquently wrote, dissenting from denial of rehearing *en banc* in the court below:

> All too many of the other great tragedies of history – Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few – were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the *Militia Act* [of 1792] required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold

> off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.
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> . . . However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Pet. App. 46.

The Framers of the Fourteenth Amendment understood as much, and they ensured that the States could not infringe upon an individual's right to keep and bear arms.[6]

III. The Second Amendment Guarantees An Individual Liberty Both To "Keep" And To "Bear" Arms.

The Bill of Rights guarantees rights to individuals. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). This is no less true of the Second Amendment than it is of the other amendments in the Bill of Rights. The Second Amendment's very text, the history surrounding its adoption, and the purposes it was intended to serve make clear that individuals have a right to keep and bear arms. The Fifth Circuit's decision in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), and the dissenting opinions in this case make clear that the textual and historical evidence overwhelmingly

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[6] Although the court below did not address this issue, incorporation of the Second Amendment also presents an opportunity for this Court to revisit the original understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. *See, e.g.*, *Nordyke v. King*, 319 F.3d 1185, 1193 n.4 (9th Cir.) (Gould, J., specially concurring), *petition for rehearing en banc filed* (9th Cir. Apr. 1, 2003) (No. 99-17551); *see also Saenz v. Roe*, 526 U.S. 489, 521-23 (1999) (Thomas, J., joined by Rehnquist, C.J., dissenting) (suggesting that the *Slaughterhouse Cases* misinterpreted the Privileges or Immunities Clause); Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 898-901 (2001).

supports such an interpretation. *See also Printz v. United States*, 521 U.S. 898, 939 n.2 (1997) (Thomas, J., concurring) ("Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that 'the right to keep and bear arms' is, as the Amendment's text suggests, a personal right.") (citations omitted); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) (The Second Amendment includes "a right (admittedly of uncertain scope) on the part of individuals."). Due to space constraints, we can only touch upon the most salient evidence discussed in these opinions.

1. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. This Court has long emphasized the importance of the textual commands of the Constitution: "'The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.'" *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618-19 (1895) (quoting *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 188 (1824)); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged."). As we demonstrate below, both the operative clause and the preface of the Second Amendment secure an individual right.

The People. Throughout the Constitution, "*the people*" has a uniform meaning, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and consistently refers to individuals. In addition to securing "the right of *the people* to keep and bear arms," the Bill of Rights also protects "the right of *the people* peaceably to assemble" and to "petition the Government for a redress of grievances," affirms the "right of *the people* to be secure in their persons, houses, papers, and effects," and safeguards the rights "retained by *the people*." U.S. CONST. amends. I, IV & IX.

All of these rights belong to each individual. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (Fourth Amendment); *Roberts*, 468 U.S. at 618-19 (First Amendment). These precedents confirm the obvious: every individual has a constitutional right to be free from unreasonable searches and seizures and to assemble and petition the government. The exercise of these rights is not contingent upon collective action. The Second Amendment is no different. "The people" are individuals, and to them the Second Amendment belongs.

Right. The term "Right" mandates the same conclusion. The Constitution both protects "rights" and confers "powers." Throughout the Constitution, rights are vested *exclusively* in individuals: for instance, the rights to a speedy and public trial by jury, and to be secure in the home against unreasonable searches and seizures. U.S. CONST. amends. IV & VI. In securing a "right" to "the people," the operative clause of the Second Amendment clearly protects an individual liberty to "keep and bear arms."

Keep Arms. To "keep" arms and to "bear" them, have separate meanings, each of which supports the conclusion that the Second Amendment secures an individual liberty. The common usage of the term "keep" establishes an individual right. Noah Webster's 1828 dictionary defined the term as:

> **1.** To hold; to retain in one's power or possession; not to lose or part with; as, to keep a house or a farm; to keep any thing in the memory, mind or heart; **2.** To have in custody for security or preservation.

See also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1770) (defining "keep" as "1. To retain: not to lose. 2. To have in custody. . . . "). Thus, "to keep" suggests a personal act of possession. Since it is impossible to give any other coherent meaning to this term, the Ninth Circuit simply chose to give no effect at all to this portion of the Second Amendment. *See* Pet. App. 105 ("The reason why [keep] was included in the amendment is not

clear. . . . [I]t seems unlikely that the drafters intended the term 'keep' to be broader in scope than the term 'bear.' "). Such a cavalier approach to the Constitution's text is squarely foreclosed by this Court's precedents. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946) (" 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.' ") (quoting *Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 570-71 (1840)); *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803).[7] Thus, the Amendment's designation of a right to "keep" arms alone makes clear that individuals have the right to possess firearms.

Bear Arms. Commonly understood, to "bear" means "to carry." Webster's 1828 dictionary provided these definitions of "to bear":

> **1.** To support; to sustain; as, to bear a weight or burden; **2.** To carry; to convey; to support and remove from place to place; as, "they bear him upon the shoulder"; "the eagle beareth them on her wings;" **3.** To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat.

By the plain meaning of "to bear," the Second Amendment means that the right of the people to carry, convey, wear on their person, support, or transport arms is protected. *Cf. Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsberg, J., with whom Rehnquist, C.J., and Justices Scalia and Souter joined, dissenting) (equating the term

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[7] Eighteenth Century usage further undercuts the suggestion that "keep" simply melts into "bear arms." As Judge Kleinfeld noted, colonial statutes, among others, employed "keep" and "bear" together with separate meanings. Pet. App. 52 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

"carry" with the term "bear" as used in the Second Amendment).[8]

The collectivist interpretation of the Second Amendment is further undercut by the historical record. While "bear arms" has a military connotation, that has never been its only one. Contemporaneous state constitutions protected individuals' right to "bear arms" in "self-defense"; the Fifth Circuit cited no less than eleven such examples. *Emerson*, 270 F.3d at 230 n.29. The phrase was also used to refer to hunting activities. *See, e.g.*, 2 THE PAPERS OF THOMAS JEFFERSON 443-44 (J.P. Boyd ed., 1950) (in 1785 James Madison proposed to the Virginia Legislature a bill that would penalize any hunter who "shall bear a gun out of his inclosed ground, unless whilst performing military duty"). And, of course, "bear arms" may be limited to its military connotation only if the term "militia" in the prefatory clause requires the bearer to be in the military.[9]

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[8] Some argue that "keep and bear arms," must be read as a unitary phrase, which in turn has a specialized military meaning. Pet. App. 105 (citing Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 317 (2000)). But this reading fails the text for a number of reasons. First, "keep" has no military connotation. Second, the primary and secondary definitions of "bear" are nonmilitary. Third, even assuming *arguendo* that "bear arms" has a military connotation, the Second Amendment lacks the requisite textual evidence to constrain the phrase to that meaning. As discussed *infra*, the term "militia" does not limit the Amendment, and the term "keep" does not have a military connotation.

[9] Proponents of a more limited reading of the Second Amendment point to Madison's first draft, which included the clause "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Here, they argue, "bearing arms" can have only a military connotation. But surely, one who is "religiously scrupulous of bearing arms" can have an equal aversion to the use of firearms in hunting or in self-defense as in military service. That the term "bearing arms" does not refer exclusively to military service is plain on the face of this draft, as Madison found it necessary next to refer specifically to "military service" as the thing from which one "religiously scrupulous" was to be excused. Were it otherwise, it would have sufficed to say that such a person should be excused from "bearing arms." As

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But, as discussed *infra*, "militia" referred to a much broader swath of the civilian population, regardless of actual military service. *Cf. Miller*, 307 U.S. at 179. Thus, the term "bear," as applied to arms, has its usual meaning – to carry, whether militarily or not. And that understanding in turn underscores the conclusion that the right is vested in the individual.[10]

2. Contrary to the Ninth Circuit's conclusion, this Court's decision in *Miller* does not establish that the Second Amendment protects only a communal right. If the Second Amendment vests no individual right, the Court need only have said so. Instead, the Court looked to the merits of the constitutional challenge as it applied to a sawed-off shotgun:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

307 U.S. at 178. To the extent that a case is made that a weapon falls within the "ordinary military equipment," *Miller* strongly suggests that the Amendment does have individual application.

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different terms in close proximity are presumed to have different meanings, *United States v. Bean*, 123 S. Ct. 584, 587 n.4 (2002), the use of "military service" itself suggests that "bear arms" did *not* have a purely military meaning.

[10] Given its holding, the Ninth Circuit did not pass on the next logical question: what falls within the meaning of the term "arms" within the Second Amendment? *See, e.g.*, Lund, at 56-76. As the lower court did not address the question, it is not properly before this Court.

Miller lends further strong support to the view that the Second Amendment secures an individual right. Article I allows Congress to call the militia into federal service, but reserves the appointment of militia officers and training to the States. U.S. CONST. art. I, § 8, cls. 15-16. The Court in *Miller* observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces" – *i.e.* to ensure that the militia was available for federal service, whether or not the States attended to it, "the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178. The Second Amendment "must be interpreted and applied with that end in view." *Id.* As the Second Amendment was intended, in part, to secure the militia's effectiveness regardless of whether the States attended to it, it cannot be that the Second Amendment protects only States' right to organize a militia.

3.a. In the face of the clear meaning of the Second Amendment's operational language, the Ninth Circuit attempted to justify its collectivist interpretation by seizing upon the Amendment's prefatory clause. While a preamble may inform, influence, or shape the operational clause, it cannot compel a result contrary to its meaning. *See* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998). The Second Amendment's preamble, however, is not inconsistent with the individual liberty mandated by the operational clause.

Certainly, the prefatory clause proffers a purpose for the right to "keep and bear arms." But nothing compels the conclusion that this is the only purpose. Earlier this Term in *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), the Court addressed a similar construction of the preambulatory language in the Copyright Clause, which reads "The Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. The Court concluded that Congress's power to secure exclusive rights to authors and inventors is not limited by the prefatory purpose to "promote the progress of science

and useful arts." *Eldred*, 123 S. Ct. at 784. While promoting science and the arts may be the chief purpose of the copyright power, that is not the only purpose. *See, e.g.*, *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (advancing science and the useful arts is the "primary purpose" of the clause); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (rewarding inventors and authors is "a secondary consideration" of the clause).

The operational language of the Copyright Clause is expressly contingent on the prefatory language, as it is introduced with the words "by securing." The Second Amendment, by contrast, has no such limitation. If the prefatory language of the Copyright Clause cannot be read to state its sole justification, nor can that of the Second Amendment. Volokh, *The Commonplace Second Amendment*, at 807-13. Rather, the right to keep and bear arms must be understood in light of the many reasons that the founding generation of Americans valued that right, including hunting and self-defense. *See, e.g.*, *The Address & Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, Pennsylvania Packet (Dec. 18, 1787) (*reprinted in* 1 DEBATE ON THE CONSTITUTION 526, 532 (Lib. of Am. 1993)).

b. Even assuming *arguendo* that the prefatory clause places a limitation on the scope of the "right of the people to keep and bear arms," it cannot be properly understood to curtail the *individual* nature of the freedom to keep and bear arms.

Militia. The invocation of "the militia" as being "necessary to the security of a free state" supports the conclusion that the right to "keep and bear arms" is an individual one. As the Court in *Miller* acknowledged,

> *the Militia comprised all males physically capable of acting in concert for the common defense.* . . . [O]rdinarily when called for service *these men were expected to appear bearing arms supplied by themselves* and of the kind in common use at the time.

Miller, 307 U.S. at 179 (emphases added). In reaching this conclusion, the *Miller* Court drew upon centuries of consistent understanding. The ratifying debates confirm the Court's understanding of the term "militia." Both the Virginia and North Carolina ratifying conventions spoke of "a well regulated militia composed of the body of the people." *Ratifications and Resolutions of Seven State Conventions* (Sept. 1788) (*reprinted in* 2 DEBATE ON THE CONSTITUTION 561, 568 (Lib. of Am. 1993)). And, as noted above, the Second Congress defined the militia to comprise "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years." Militia Act, 1 Stat. 271 (1792).[11] Nor can the text be confined to a statist reading. If "the militia" is read to refer to a standing fighting force, the Second Amendment would directly conflict with Article I, which expressly bans the States from maintaining troops. U.S. CONST. art. I, § 10, cl. 3.

Well Regulated. The modifier "well regulated" does not alter the Amendment's meaning. Some argue that "well regulated" constrains the militia to those enrolled, trained, and supplied by the State. Pet. App. 100. This cannot be the case for the same reasons why "militia" by itself cannot mean a specific military force. The historical record further refutes this contention. The Constitution preserved the appointment of officers for, and the training of, the militia to the States, but subject to "the discipline prescribed by Congress." U.S. CONST. art. I, § 8, cl. 16. Under the Militia Act of 1792, the well regulated militia hence meant one enrolled on the public lists, armed, decently equipped, and perhaps occasionally drilled. *Accord Emerson*, 270 F.3d at 234-35 & nn.33-34 (citing authorities). "Well regulated" emphatically did not mean a

[11] The views of early Congresses are strongly persuasive as to Constitutional meaning. *Eldred v. Ashcroft*, 123 S. Ct. at 779; *Printz*, 521 U.S. at 905.

militia armed by the Government, or a militia of trained soldiers.[12]

The term "militia" may be read to limit the right of "the people" only if the former term is held to mean the latter. Such a reading would be inconsistent with several canons of construction. It is presumed that different words used in proximity have different meanings. *See supra* note 9. The Framers employed the term "the people" elsewhere in the Bill of Rights and certainly did not confine it to the "militia." *See supra* at 11; *Verdugo-Urquidez*, 494 U.S. at 265. As Thomas Cooley concluded:

> The meaning of the provision undoubtedly is, that *the people, from whom the militia must be taken, shall have the right to keep and bear arms,* and they need no permission or regulation of law for the purpose.

THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 281-82 (2d ed. 1891). That is why the right is secured to "the people," not to "the militia."

Finally, reading the prefatory clause so narrowly would be to depart from this Court's wealth of decisions affording broad construction to individual civil liberties. *See, e.g., Byars v. United States*, 273 U.S. 28, 32 (1927) ("Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'") (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

Security Of A Free State. If anything in the prefatory clause shapes the "right of the people to keep and bear

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[12] Pet. App. 59-63 (Kleinfeld, J., dissenting from denial of petition for rehearing *en banc*); Lund, at 24-25 ("A well regulated militia is, among other things, one that is not overly regulated or inappropriately regulated. The Second Amendment simply forbids one form of inappropriate regulation: disarming the people from whom the militia must necessarily be drawn.").

arms," it is the focus on "the security of a free State." In the Framers' view, the Republic could be challenged either from without *or from within*. *See, e.g., Nordyke v. King*, 319 F.3d at 1196 (Gould, J., specially concurring).

The Anti-Federalists had complained bitterly that the Federal government would abuse the militia, allow it to wither, and replace it with a potentially oppressive standing army. *See, e.g., Patrick Henry's Objections to a National Army, Speech at the Virginia Ratifying Convention* (June 16, 1788) (*reprinted in* 2 DEBATE ON THE CONSTITUTION, 695-97 (Lib. of Am. 1993)); *Brutus IX*, NEW YORK JOURNAL (Jan. 17, 1788) (discoursing the dangers of standing armies); *Brutus X*, NEW YORK JOURNAL (Jan. 24, 1788) (same); *see also Emerson*, 270 F.3d at 237-39. Their concern ran not only to a professional federal army, but also to a standing, or "select" militia – one always formed, rather than civilian and waiting to be called up. *See Emerson*, 270 F.3d at 250 & n.58 (citing authorities).

The Second Amendment answered the perceived threat to freedom posed by these powers with the guarantee that individual citizens could not be disarmed. This lessened the need for a standing army by providing a ready fighting force if necessary, diminished the specter of a standing army, and thus minimized the potential for domestic despotism, whether state or federal. "[I]f in any blind pursuit of inordinate power, either [the Federal or a State Government] should attempt [to disarm the people], this amendment may be appealed to as a restraint on both." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION (1829).

4. As demonstrated above, the historical circumstances surrounding the Amendment and its very purpose confirm that it secures an individual right. From the English Bill of Rights to the Militia Act of 1792 to the Freedmen Bureau's Bill of 1866, the history of this Nation demonstrates a profound respect for an individual's right

to possess firearms. The Second Amendment empowers individual citizens to defend themselves and their property against the acts of criminals, mob violence, and even state-sponsored oppression. Only individual possession of firearms allows for the effective exercise of self-defense against such threats. It does the rape victim no good to have armed police arrive at the scene after the crime has been committed. It does the shopkeeper no good to have national guardsmen restore order after a riot has destroyed his livelihood. And it would have done the Minutemen no good if the Crown alone had been in possession of guns in the colonies. The Founders understood all this, as reflected in the Second Amendment. As Justice Story observed, "The *right of the citizens* to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary powers of rulers." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1890 (1833) (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEAN SILVEIRA, *et al.*,
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v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF DOCTORS FOR SENSIBLE GUN LAWS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

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BRIEF OF DOCTORS FOR SENSIBLE GUN LAWS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND REVERSAL

INTERESTS OF THE *AMICUS CURIAE* [1]

Amicus Curiae Doctors for Sensible Gun Laws ("DSGL") is an organization of Ph.Ds, M.D.s, and other health care professionals who are concerned about the proliferation of ineffective and counterproductive gun laws. DSGL is an internet based (*http://www.dsgl.org*) network whose members have collectively spent thousands of hours researching the role of guns in American society. DSGL's mission is to educate fellow doctors and their patients, about gun laws that

[1] All parties in this appeal have graciously consented to the filing of this brief which supports the position of Petitioners. These consents have been filed with the Clerk of the Supreme Court.

are counterproductive and the deceitful tactics of those who advocate gun control. DSGL seeks to expose the distortions and propaganda tactics of those who advocate stricter gun control measures for personal and political expediency.

SUMMARY OF ARGUMENT

DSGL's intent is to warn the Court of fallacious arguments that may be advanced by other doctors who are members of the anti-gun lobby. For approximately the last two decades, a small number of politically motivated doctors have used their respected position in society to advance their personal political agenda with regard to the issue of Constitutional rights vs. gun control. They have put forth the position that gun violence should be studied and treated as a public health problem. They further hypothesize that guns actually cause violence and that they have a net negative impact on society.

It is important for the court to be aware that these anti-gun doctors do not speak for all doctors. It is even more important to understand the serious errors and deliberate distortions that have been built into virtually all of the anti-gun studies that have been conducted under the guise of medical research. These studies are perfect examples of what has come to be known as "junk science" or "results oriented research."

Many doctors and other scholars have spoken out against this perversion of medical science for political gain. In our opinion, the entire body of anti-gun medical research has been completely and resoundingly discredited. That is why Certiorari must be granted, before other constitutional rights are stripped based upon hysteria and junk science, such as what has taken place in the Ninth Circuit in *Silveira v. Lockyer*. A short review of this literature is important to the understanding of the role of doctors in the gun control debate.

ARGUMENT FOR GRANTING CERTIORARI AND REVERSAL

I. INTRODUCTION

From the founding of this nation, firearms in the hands of citizens, has overwhelmingly benefited society. Independence from the English crown was squarely secured by citizens possessing and using firearms and the necessity of ensuring the rights of American citizens to bear arms remains just as relevant today. The stability of civil society is promoted by citizens who are empowered to resist would-be tyrants usurping political power; or defending their lives and property, whether from foreign terrorist organizations or from the more mundane local criminal elements intent on committing grievous bodily harm, rape or murder in the advancement of their own personal goals.

The vast weight of the evidence shows firearms in the hands of law-abiding citizens actually reduces violence and crime thereby benefiting society with lives saved, injuries prevented, medical costs averted, and property protected. Amicus Curiae will demonstrate the blatant falsehood of repeated claims that "guns" harm society and are the cause of violence. Certainly, claimed "pathogens" of violence such as violent video games and Hollywood movies are protected by the First and Fourteenth Amendments.[2] Yet the Ninth Circuit,

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[2] Paducah, Kentucky. Jonesboro, Arkansas. Littleton, Colorado. These three towns recently experienced similar multiple school shootings which have been linked to violent video games. Anderson, Craig A., Ph.D., Iowa State University of Science and Technology and Dill, Karen E., Ph.D., Lenoir-Rhyne College, *Video Games And Aggressive Thoughts, Feelings, And Behavior In The Laboratory And In Life*, Journal of Personality and Social Psychology, Vol. 78, No. 4 (2001); Anderson, Craig A. and Bushman, Brad J., *Effects Of Violent Video Games On Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, And Prosocial Behavior: A Meta-Analytic Review Of The Scientific Literature*, Iowa State University, School of Psychology, American Psychological Society VOL. 12, NO. 5, (2001). According to

has abrogated an important constitutional right based upon personal policy preferences, politics, and hysteria without sufficient evidence supporting such an opinion.

Amicus Curiae provides this information for the sole purpose of showing the absence of any compelling governmental interest that would justify any law which involves forcible state confiscation, compulsory registration, or state-decreed monopolization and licensing of firearms. To the contrary, it is a compelling government interest to promote the health, welfare and safety of its citizens by protecting their lives and property from threats of harm by others. Further, it is academic that the government cannot protect all citizens and all property from all harm, all the time. As that burden ultimately falls unto each citizen, the health, welfare and

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Dr. Anderson, "[v]iolent video games provide a forum for learning and practicing aggressive solutions to conflict situations." "In the short run, playing a violent video game appears to affect aggression by priming aggressive thoughts. Longer-term effects are likely to be longer lasting as well, as the player learns and practices new aggression-related scripts that can become more and more accessible for use when real-life conflict situations arise." In fact, a *Joint Statement On The Impact Of Entertainment Violence On Children*, Congressional Public Health Summit, (July 26, 2000), was signed by Donald E. Cook, MD, President, American Academy of Pediatrics; Clarice Kestenbaum, MD, President American Academy of Child & Adolescent Psychiatry; L. Michael Honaker, PhD., Deputy Chief Executive Officer, American Psychological Association; Dr. E. Ratcliffe Anderson, Jr. MD, Executive Vice President, American Medical Association; American Academy of Family Physicians; American Psychiatric Association. The Joint Statement to Congress read in part: "At this time, well over 1000 studies - including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations - our own members - point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children." [Emphasis added]

safety of citizens is promoted by those citizens being able to legally protect and defend themselves from those who seek to impart unlawful harm. Accordingly, the right of citizens to bear and possess arms is a compelling governmental interest.

II. GUN CONTROL IS NOT CRIME CONTROL

To place the specifics of the current gun laws in perspective, the larger perspective of gun control must be examined. A study of 15 years' of data by University of Chicago researchers shows that "1,570 murders; 4,177 rapes; and over 60,000 aggravated assaults would have been avoided yearly" if states with restrictive laws would reform those laws to make it easier for mentally competent, law-abiding adults to carry concealed handguns for protection outside the home.[3]

The scholarly literature increasingly vindicates firearms as "pathogens" of violence, and it exposes gun control as a "placebo" or "suicide pill," rather than a "cure" for gun violence.[4] In fact, the strategy of repackaging gun control as a

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[3] Lott, Jr., John and Mustard, D.B. *Crime, Deterrence, And Right-To-Carry Concealed Handguns.* Journal of Legal Studies. (January 1997); Lott, Jr., John *More Guns, Less Crime: Understanding Crime And Gun-Control Laws* Studies in Law and Economics (University of Chicago 1998).

[4] Suter EA, Waters WC, 4th, Murray GB, Hopkins CB, Asiaf J, Moore JB, Fackler M, Cowan DN, Eckenhoff RG, Singer TR, et al. *Violence In America—Effective Solutions,* 84(6):253-263 Journal Med. Assoc. GA. (1995); Lott, Jr., John *The Bias Against Guns: Why Almost Everything You've Heard About Gun Control Is Wrong* (Regnery 2003); McClurg, Kopel, & Denning, *GUN CONTROL & GUN RIGHTS* (N.Y.U.: eds. 2002), Poe, Richard, *The Seven Myths Of Gun Control* (Random House: Prima 2001), Waters, Robert A., *Guns Save Lives* (WA: Loompanics.com 2002); Lott, Jr., John R. *More Guns, Less Crime: Understanding Crime And Gun Control Laws.* Series: (SLE) Studies in Law and Economics (1998).

"public health" measure[5] resulted because of the near unanimous recognition within criminological scholarly literature, that gun control was a failure as crime or violence control.[6]

Stringent gun control does not, and cannot, keep firearms out of the hands of willful predators who ignore laws against drug trafficking, rape, and murder. Indeed, that is why they are called "criminals." Or, as the war in Iraq demonstrates, even an occupying force cannot disarm those that would ignore an edict to turn in all their firearms; a person or group of individuals that do not want to be disarmed, will not disarm. By analogy, stringent drug control laws have not eradicated drugs from the streets of America.

By whatever increment any firearm control measure inconveniences criminals, those criminals are not (the wishful and repeated claims of gun control advocates to the contrary notwithstanding) "prevented from obtaining guns." They are merely displaced into the fast and uncontrolled illegal gun market.

Gun control merely impedes gun purchases by law-abiding citizens, who ultimately become the predators' victims. Victim disarmament does not save lives; it costs lives. Quite simply, gun control is a counter-productive, even deadly, failure.

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[5] Sugarmann J and Rand K., *Cease Fire—A Comprehensive Strategy To Reduce Violence*, Washington DC: Violence Policy Center (1993).

[6] This voluminous literature is best summarized in Kleck G., *Point Blank: Guns And Violence In America*, (New York: Aldine de Gruyter 1991)(Gary Kleck, Ph.D. is a Professor in the School of Criminology and Criminal Justice at Florida State University. His research centers on violence and crime control with special focus on gun control and crime deterrence. See also the scholarly work of John R. Lott, Jr., *supra*, the former Senior research scholar at Yale University School of Law1999-2001 and Law and Economics Fellow at the University of Chicago School of Law 1995-1999, and other prestigious posts.

III. FIREARMS ARE NOT A "MEDICAL ISSUE"

Whether measured in human or economic terms, peer-reviewed cost-benefit analysis establishes an overwhelming net benefit of guns in our society. Significantly more lives and money are saved using firearms, than are lost using them.[7] Without exception, all 14 studies of defensive firearm use suggest Americans use firearms defensively from 1 million to 2.5 million times annually.[8] The largest-scale, most comprehensive study of protective firearm use, Kleck & Gertz's National Self-Defense Survey, suggests about 2.5 million protective uses by adult Americans against human attackers each year. This means lives saved, injuries prevented, medical costs averted, and property protected. This also coincides with the government's interest of promoting the health, welfare and safety of its citizens.

About 400,000 of those who used firearms for self-defense believe they would have lost their lives had they not had a firearm for protection. Even if 90 percent of these firearm defenders were mistaken, the number of lives saved using firearms still outnumbers the lives taken using firearms by thousands. In some 98 percent of these defensive uses, the gun is not even fired. In only about 0.1 percent (one-in-a-thousand) of the protective uses is the attacker killed.[9]

The common misperception is that "Semi-automatic assault weapons are turning America's streets into war zones. True, ***they are not responsible for a large number of homicides***, but what they do is offer the possibility. . ." [emphasis added]

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[7] Suter EA, et al., *Violence In America—Effective Solutions* 84(6):253-263 J. Med. Assoc. GA (June 1995).

[8] Kleck, G. and Gertz, M., *Armed Resistance To Crime: The Prevalence And Nature Of Self-Defense With A Gun* 86:143-186 Journal of Criminal Law & Criminology (1995).

[9] Suter EA, et al., *Violence In America—Effective Solutions*. 84(6):253-263 J. Med. Assoc. GA (June 1995).

Senator Dianne Feinstein: *Congressional Record*, November 9, 1993. The reality is that they are not involved in any statistically significant number of crimes.

Contrary to widespread claims, semi-automatic "military-style" weapons are rarely used by criminals in general or by drug dealers or juvenile gang members. In particular, they are almost never used to kill police officers, are generally less lethal than ordinary hunting rifles, and are not easily converted to fully automatic fire. They do offer a rate of fire somewhat higher than other gun types and can be used with magazines holding large numbers of cartridges, but there is absolutely no evidence demonstrating that so called "assault weapons" are relevant to the outcome of any significant number of gun crimes.[10] In fact, fewer than 2% of gun homicides involve the military-style semiautomatic weapons which are commonly labeled "assault weapons."[11]

As per the CDC's own statistics on firearm deaths: In 2000 within the United States, there were 16,386 homicides, of which 10,777 were caused by firearms—in fact, this number has remained consistent at about 10,000 per year for the last 20 years.[12] From a purely statistical standpoint, it is obvious that firearm deaths are not an escalating crisis as promoted by the anti-gun lobby.[13]

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[10] Kleck, G., *Point Blank: Guns And Violence In America*. New York: Aldine de Gruyter. (1991).

[11] *Id.*

[12] See CDC's WISQARSTM (Web-based Injury Statistics Query and Reporting System), which is an interactive database system that provides customized reports of injury-related data.

[13] Secondhand smoke is the third leading cause of preventable death in this country, killing 53,000 nonsmokers in the U.S. each year. In the largest study ever conducted on the issue, Harvard Medical School found that a high exposure to secondhand smoke nearly doubles a woman's risk of having a heart attack. In sum, over 400,000 people die each year from the physiological effects of tobacco alone. California being the most with

It is undisputed that a crowd of people killed by a crazed gunman would grab the headlines of major news organizations, and thus energizing the calls for more gun control. The tragedy in Santa Monica, California in which a 1992 Buick plowed into a crowded farmers market killing 10 people and critically injuring 15, made headlines, but there was no demand for the elimination of motor vehicles from America's streets. Such an argument would be absurd in light of the overwhelming utility and benefit to society from the use of automobiles. Substitute the word Buick with "semi-automatic", and the societal utility and benefits of gun ownership is ignored. Yet, the reality is that far more people are killed by cars, tobacco, alcohol, and blunt objects than by guns. It is no counterargument that such guns are inherently dangerous instrumentalities because the very purpose of guns is to be dangerous, in particular to a transgressor threatening rape, bodily harm or death. The danger from a gun is what effectively reduces crime. The above evidence bears out that guns in the hands of citizens is a beneficial utility on a societal scale.

Amicus Curiae respectfully requests that the Petition For Writ Of Certiorari be accepted, and that further briefing be accorded to Amicus Curiae on this very important constitutional issue.

43,000 annually. According to the Surgeon General, "[I]n 1999, approximately 165,000 women died prematurely from smoking-related diseases, like cancer and heart disease. Women also face unique health effects from smoking such as problems related to pregnancy." A Report of the Surgeon General–2001, Women and Smoking *http://www.cdc.gov/tobacco/sgr/sgr_forwomen/pdfs/ataglance.pdf* California Department of Health Services, Tobacco Control Section. *http://www.dhs.ca.gov/tobacco; http://www.cdc.gov/tobacco* See CDC's WISQARSTM (Web-based Injury Statistics Query and Reporting System), which is an interactive database system that provides customized reports of injury-related data.

CONCLUSION

For the reasons set out, this Court should grant the petition for writ of certiorari, reverse the judgment of the US Court of Appeals in *Silveira* v. *Lockyer*, 312 F.3d 1052 (9th Cir. 2003), and remand.

Repectfully submitted,

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